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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROSIE LEE PEGUES, *et al.*,
Petitioners,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

This is a class action against a State Employment Service under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., challenging racial and sexual discrimination by the agency in deciding which applicants to refer to employers with job vacancies. The questions presented are:

1. Where the employment agency enforces an employer's educational and other requirements for entry-level jobs and makes no effort to use its power to demand evidence of the job-relatedness of such requirements, and where Census statistics would suffice to show disparate impact in an action against the employer, does the mere fact that the action is brought against the employment agency mean that such statistics are no longer sufficient to show disparate impact?

2. Where plaintiffs have made statistical and other showings of classwide

discrimination, are mere armchair speculations of the defendants---to the effect that inclusion of other factors in the analysis might possibly lead to a different result, without ever putting on evidence supporting the conjecture---sufficient to cause the rejection of plaintiffs' statistics and to relieve the defendants from a shifting of the burdens of production and persuasion?

Petitioners:

Rosie Lee Pegues
Rebecca Gillespie
Mary Boyd
Robert Williams

Members of the certified class:

a. All Black persons who have sought, or are seeking, or might seek employment through the services offered by the Bolivar County office of the Mississippi State Employment Service and who have been or may be in the future, discriminated against on the basis of race in the referrals for employment made by said office.

b. All females who have sought, or are seeking, or might seek employment through the services offered by the Bolivar County Office of the Mississippi State Employment Service and who have been or may be in the future discriminated against on the basis of sex in the referrals for employment by said office.

Respondents:

Mississippi State Employment Service of the Mississippi Employment Security Commission
John C. Aldridge
Ernest C. Lindsey
U.S. Secretary of Labor
U.S. Employment Service

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Rosie Lee Pegues et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on March 11, 1983.

OPINIONS BELOW

The April 29, 1983 Order of the Court of Appeals denying the petitions for rehearing and the suggestion for rehearing en banc is

reproduced in the Appendix at App. 1a. The March 11, 1983 opinion of the Court of Appeals is reported at 699 F.2d 760, and is reproduced in the Appendix at App. 3a. The March 7, 1980 decision of the district court is reported at 488 F.Supp. 239, and is reproduced in the Appendix at App. 66a. The March 7, 1980 Final Judgment of the district court is reproduced in the Appendix at App. 151a.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Court of Appeals were entered on March 11, 1983. Petitioners and the Mississippi respondents filed timely petitions for rehearing, and petitioners filed a timely suggestion for rehearing en banc. The petitions and suggestion were denied on April 29, 1983. App. 1a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case is brought pursuant to § 703(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(b), which provides:

> (b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

1. The Proceedings Below

Plaintiffs filed their original EEOC charges in early 1970, and timely filed their judicial Complaint in January 1972. This case was certified as a class action covering black applicants and female applicants at the Cleveland (Bolivar County) branch office of the Mississippi State Employment Service ("MSES"). It did not challenge the internal employment practices of MSES, but challenged racial and sexual discrimination in MSES's activities as an employment agency, in choosing which applicants to refer to employers with jobs to fill.

After a three-week trial, the district court found against plaintiffs on all issues but one,[1] and entered final judgment against plaintiffs on all issues, but did not enter specific findings of fact on most of the evidence,[2] and did not address all of the claims over which it had jurisdiction.

On March 11, 1983, the court of appeals affirmed in part and reversed in part.

1/ The exception was the trial court's finding that MSES's enforcement of Travenol Laboratories' tenth-grade educational requirement for Operative jobs (Assemblers and Material Handlers) was discriminatory, but that plaintiffs should have no relief because the servicing of Travenol's job orders ended in November 1971, two months prior to the filing of the judicial Complaint in this case. App. 143a-145a. The court of appeals did not address plaintiffs' appeal from this denial of relief, despite the personal injury suffered by the plaintiffs and the injury suffered by class members up to November 1971, twenty-one months after the filing of EEOC charges. MSES continues, to this day, to enforce unvalidated educational requirements set by employers. The issue is hardly moot.

2/ The court of appeals so recognized at App. 24a n. 7.

It found[3/] that MSES had engaged in classwide sexual discrimination against women by automatically enforcing employers' stated sexual preferences that only applicants of a specific gender be referred on certain job orders, without requiring from the employers any showing that the preferences were supported by a bona fide occupational qualification. (App. 32a-35a). The court of appeals also found that MSES had abused its coding system, which is supposed to ensure that applicants are classified in the occupational codes for the jobs they are best fit to perform, and which is also supposed to ensure that all applicants in the same job code have the same opportunity of referral.[4/]

3/ Because of the death of the trial judge, the court of appeals made its own findings. App. 24a n. 7.

4/ The court of appeals described the operation of the coding system in detail at App. 12a-17a. See also infra at 20-21.

The court of appeals found that MSES had engaged in classwide racial discrimination against blacks in the "systematic referral of applicants to positions other than those for which they were classified"---i.e., that MSES had overridden its own determination of qualifications. Whites not coded as qualified in desirable clerical and sales occupations were disproportionately referred to employers with clerical and sales vacancies; blacks not coded as suitable for less desirable service occupations were disproportionately referred to employers with service jobs; of those disproportionately few whites referred out-of-code to service jobs, a large number were referred for desirable waitress positions; the blacks referred out-of-code to service jobs were mostly referred to stereotypically black jobs such as domestic servant or cook. (App. 35a-36a). The court of appeals also found that one of

the named plaintiffs had been discriminated against because of her race. (App. 38a n. 10, 63a-65a).

In all other respects, the court of appeals affirmed the district court. Like the district court, it failed to decide a number of the issues over which it had jurisdiction.[5/] It rejected the bulk of plaintiffs' statistical evidence as insufficient to shift the burden of production and of persuasion to the defendants, and accordingly did not evaluate the defendants' statistical evidence. (App. 45a-46a).

5/ These included MSES's enforcement of Travenol's educational requirements which had already been found to have had racially disparate impact against blacks and to have been unlawful (see n. 1, supra) and MSES's continued servicing of Travenol job orders despite its own officials' awareness that Travenol imposed hiring requirements on blacks which it did not impose on whites. Plaintiffs' exhibit 116 is an MSES document showing its officials' knowledge that Travenol rejected all black applicants unless they were known and recommended by three particular black individuals. (Tr. 2285-87). Petitioners have no idea why the court of appeals failed to decide this issue.

For the purposes of this petition, the relevant holdings of the court of appeals were (a) that the types of Census statistics this Court has always held sufficient to show the racially disparate impact of an employer's educational requirement or other objective requirement could not be used to show the racially disparate impact of an employment agency's enforcement of the identical requirement (see infra at 14-18); (b) that a novel standard crafted by the court of appeals in this case must be used instead, despite the fact that it would as a practical matter be impossible to apply (see infra at 25-26); and (c) that plaintiffs' statistical showings of classwide disparate impact and of classwide disparate treatment were inadequate to shift the burdens of production and of persuasion to the defendants because of mere conjectures by the defendants, unsupported by any record evidence, that

factors not included in the analysis might conceivably had led to different results if they had been included. (See infra at 19-23). Plaintiffs are thus required, as part of their initial showing of discrimination, to disprove virtually all conceivable nondiscriminatory explanations for the disparate results shown, simply to protect their case from a kind of mandatory presumption flowing from a defendant's armchair speculation.

2. The Activities of MSES

The Mississippi State Employment Service is a division of the Mississippi Employment Security Commission, and is a part of the nationwide system of State and local employment services funded and regulated by the United States Employment Service under the Wagner-Peyser Act, 29 U.S.C. §§ 49-49k. (App. 7a n. 3). The court of appeals summarized its operations as follows:

> This office, like all other MSES branch offices in Mississippi, functioned as a labor exchange, matching

> qualified applicants with available jobs. Employers make known openings by placing "job orders." Applicants make known their availability by requesting job referrals. The Cleveland office accounted for approximately 25% of all new hires in the Bolivar County labor market.

(App. 13a).

Bolivar County, in which this case arose, is in the Mississippi Delta. Like the rest of the Delta, many persons of both races live in rural areas and are in competition for entry-level jobs---particularly entry-level industrial jobs. The court of appeals noted that many blacks had been displaced from agricultural work "following the mechanization of farm labor in the 1960s", and noted MSES's arguments as to "the severe educational and experiential deficiencies characteristic of Bolivar County's predominantly black population." (App. 47a). For the hopes of employment of large numbers of blacks in Bolivar County, it is therefore imperative to insist that only job-related

education and experience requirements be used for entry-level jobs; otherwise, large numbers of perfectly capable black workers will be frozen out of the more desirable blue-collar, waitress, and similar positions for the rest of their lives.[6/]

The manager of the MSES office in question admitted that through the mid-1960's blacks had traditionally been confined to a relative handful of jobs in the area, and that whites had traditionally done everything else. (Tr. 822-23). He testified that, at least through 1978---the year prior to trial---blacks had less training and experience than whites. (Tr. 2465-66). An official from MSES State headquarters admitted that this racial stratification of employment meant that experience requirements could have a racially disparate

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6/ In light of the cited discussion of the court of appeals, its refusal to find any disparate impact of any educational or experience requirement is, to say the least, odd. See infra at 14-18.

impact against blacks. (Tr. 2281).[7/]

Plaintiffs' contention, in a nutshell, is that MSES has acted to reinforce the existing racial stratification of the job market. For example, even where an employer with an entry-level job does not have an experience requirement, MSES's referral decisions are based heavily on experience, because prior experience is the most important---on this record, the almost exclusive---determinant of the occupational codes to which applicants are assigned and which govern their chances for referral. (Tr. 821, 894, 2167-72, 2303-04; MSES Exhibit 80). The cited testimony is all from MSES officials; there is no dispute on this point.

7/ Given such testimony by MSES officials, the court of appeals' finding of no disparate impact in the servicing of experience requirements (App. 38a) seems doubly odd.

The importance of the activities of MSES in Bolivar County cannot be exaggerated. MSES Exhibits 44-52 and 55 show that in the five years from 1973 through 1978, referrals by MSES resulted in a total of 6,997 hires in non-agricultural jobs in Bolivar County. This figure becomes even more impressive in light of the 1970 Census, which showed that total employment of persons 16 years old and over in Bolivar County was only 13,942 in 1970. (Stipulation Exhibit 50, p. 26-290).

While MSES can only offer a referral to an employer, its own exhibits 44-52 and 55 show that most applicants referred are in fact hired by the employers to which they are referred. For all referrals during those five years, the hire rate ranged from a low of 67.5% to a high of 93.1%. For referrals of black applicants during that same period, the hire rate ranged from a low of 61.2% to a high of 98.1%. In most periods,

it was within a few points of the overall hire rate. Thus, referral is in many cases almost tantamount to a hire by the employer.

It is undisputed that some employers refuse to consider applicants who have not been referred to them by MSES. (Tr. 276-78, 980-81, 993-95). To this extent, being denied a referral by MSES is tantamount to being denied a job. Even without such a formal bar, it is clear on this record that a black or female applicant's best hope of getting an entry-level job is through MSES.

3. Education and Experience Requirements

MSES accepts and enforces the job requirements set by local employers, including education and experience requirements. Taking educational requirements as an example, it is undisputed that MSES enforced a large number of entry-level job orders with educational requirements such as a college requirement for a motel secretary position and,

more routinely, 12th-grade requirements for general clerical and office jobs, messenger jobs, and sales clerk jobs, 10th-grade requirements for waitress jobs, dry cleaner attendant jobs, entry-level factory jobs at Baxter Laboratories ("Travenol") and others. Travenol's 12th-grade requirement for office and clerical jobs, and its 10th-grade requirement for Assembler ("Table Worker") and Material Handler ("Material Coordinator") jobs have previously been found unlawful in other Title VII litigation.[8/]

Plaintiffs challenged the MSES defendants' practice of automatically enforcing the educational requirements of employers as long as MSES has people to refer who meet the requirements, without obtaining from the

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8/ As to the 12th-grade requirement, see Payne v. Travenol Laboratories, 565 F.2d 895, 899 (5th Cir.), cert. den., 439 U.S. 835, 58 L.Ed.2d 131 (1978); as to the 10th-grade requirement, the district court so recognized in its opinion on liability herein. App. 143a-144a.

employers any information showing that the requirements are job-related. It is undisputed that this was the actual practice of the MSES defendants: their own officials so testified,[9] and plaintiffs were entitled to rely on these admissions as controlling, notwithstanding the pro forma disclaimers in official manuals which were summarized by the court of appeals at App. 16a-17a.

To show the disparate impact of the educational requirements, plaintiffs relied, first, on stipulated Census statistics showing that the requirements disqualified from two to three times as many blacks as whites;[10] second, on the defendants' own

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9/ Testimony of the MSES local manager, Tr. 976-80; testimony of Mr. Ballard and Mr. Hart, MSES officials, in plaintiffs' exhibit 150, Dep. Tr. 5, 8, 24-25, 29, 59-60.

10/ These statistics showed that a 12th-grade requirement in Bolivar County excluded 89.8% of black males and 85.9% of black females, but only 44.4% of white males and 39.6%

(footnote cont'd)

expert study of applicants at the Cleveland office confirming these figures;[11] third, on referral statistics showing that the rate of black referrals went down sharply as the educational requirements increased;[12] and, fourth, on the prior judicial findings of disparate impact as to Travenol's educational requirements (supra note 1). The evidence as to the racially and sexually disparate impact of the experience requirements

(footnote cont'd)

of white females. The parties had stipulated that a 10th-grade requirement excluded 78.4% of black males and 70.8% of black females, but only 28.3% of white males and 22.8% of white females. (Stipulation ¶ 69).

11/ The study showed that black applicants at the MSES local office had statistically significantly less education than white applicants at that office in all years studied (Tr. 1429-36; State defendants' exhibit 71).

12/ Blacks were 44.5% of the persons referred on all job orders, 33.5% of the persons referred on job orders with 10th-grade requirements, 17.1% of the persons referred to jobs with 12th-grade requirements, and 0% of the persons referred to jobs with college degree requirements. (Plaintiffs' exhibit 8).

serviced by MSES was similar.[13/]

The court of appeals held that plaintiffs had not proven the disparate impact of the educational and experience requirements serviced by MSES, because their showings of disparate impact were not broken down "by comparison with the appropriate cross-section of the relevant labor market." This is a new legal standard, never previously applied by any court. Moreover, the court faulted plaintiffs for using subjective judgments of a lay witness to challenge only those educational requirements and experience requirements which seemed doubtful to plaintiffs.[14/] App. 37a-38a.

13/ And see the discussion supra at 10-12.

14/ Plaintiffs' exhibits did not list all educational and experience requirements, because plaintiffs did not wish to challenge obviously proper requirements, such as a degree in Accounting for an accountant's position. Plaintiffs' exercise of discretion aided the defendants, not harmed them, by restricting the challenges defendants had to meet.

4. Other Evidence of Discrimination in the Classification and Referral of Applicants

It is not necessary, for the purpose of this petition, to discuss in detail the evidence on which petitioners relied below. Most of the evidence was undisputed, and the dispute at trial went to its relevance and weight rather than to its accuracy.

Plaintiffs made a number of statistical showings tending to prove that whites and males were referred to higher-paying job vacancies than similarly qualified blacks and women, that MSES had classified whites and males in "occupational codes" which were more desirable than those into which blacks and women had been classified, and similar differences.[15/] MSES did not dispute the accuracy

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15/ Plaintiffs also relied on the U.S. Labor Department's 1968 findings of racial and sexual discrimination as to the Cleveland office, on the EEOC's detailed findings of reasonable cause to believe that there had been such discrimination, on the anecdotal

(footnote cont'd)

of any of these statistical compilations, but challenged only the weight to be given them.

The court of appeals rejected the bulk of this evidence, on the essentially speculative ground that factors other than those analyzed might account for the racial and sexual disparities shown, although there was no proof that any such factors could or would have accounted for the disparities.

For example, one set of plaintiffs' statistics showed that whites and males in "available applicant pools" had much higher rates of referrals to job vacancies than blacks and women in the same "available applicant pools". The "pools" had been

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(footnote cont'd)

evidence of class members and of the named plaintiffs, on the testimony and admissions of MSES officials, and on exhibits showing the available information about white applicants coded in desirable occupations and black applicants coded in less desirable, low-paying, traditionally-black occupations.

constructed along the lines recommended by MSES's own expert, and consisted of persons MSES itself considered equally qualified for referral,[16/] by assigning them to the same occupational codes. Thus, these exhibits accepted at face value MSES's own assessments of experience and education. The court of appeals' entire discussion of this evidence is as follows:

> Plaintiffs contend that statistically significant discrepancies in the frequency of referrals for whites and blacks during the years 1974 through 1978 has been established. These data tell us nothing of the relative qualifications of blacks and whites in the available applicant pools, or of the requirements imposed by the employers to whom referrals were made. Factors other than race may explain the variations in referral rates observed. To conclude otherwise would necessitate an impermissible degree of speculation.

16/ MSES had so represented to the trial court in its September 27, 1979 Proposed Findings of Fact and Conclusions of Law at 17; it did not disagree when petitioners quoted this representation at oral argument in the court of appeals.

(App. 43a) (Emphasis supplied). Given the representation by MSES and the lack of any evidence in rebuttal, it would be speculative to reject this evidence, not to accept it.

The opinion of the court of appeals shows numerous examples of refusals to consider plaintiffs' statistics probative because of conjectures as to (a) work preferences (at App. 25a-28a), although MSES admitted that such preferences had little or no effect on its decisions, and were not even recorded for each applicant (Tr. 883-85, 2168-69); (b) the "availability of alternate jobs at the time of interviewing" (App. 27a-28a), although job orders were placed year-round and there is no evidence of any strange patterns in the timing of job orders that would account for the racial and sexual disparities shown; (c) the relative experience of applicants (Id.), although MSES had conceded that applicants in the same code were equally qualified and should

have had equal chances of referral; (d) the proportions of blacks and whites eligible for job development activities (App. 44a-45a), although both skilled and unskilled applicants were eligible (Tr. 2445) and there is no basis for supposing that the proportions would be any different than the racial proportions among all applicants in the office; and (e) the conjectural possibility that experienced Nurse's Aides would have been referred to a Nurse's Aide training program without being tested, and that this would have happened to so many more whites than blacks, as to account for the sharp racial differences in referral rates on which plaintiffs had relied to show the disparate impact of the Nurse's Aide test (App. 55a-56a).[17/]

17/ There is no dispute on the record that all applicants referred to this training program were test-selected. Both sides agreed. (Tr. 1591, 2488-89). The court of appeals' statement to the contrary (App. 55a-56a) is an apparent oversight.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The Decision of the Court of Appeals Involves an Important Question Under Title VII Which Should Be Settled By This Court

The applicability to State Employment Services of the same Title VII standards which govern employers is of great public importance. The actions of the Cleveland office of MSES are far from unique; MSES officials admitted that all 82 local offices of MSES followed the same practices as the Cleveland office with respect to enforcement of employers' educational and experience requirements. (Plaintiffs' exhibit 150, Dep. Tr. 24-25, 29, 59-60). The U.S. Employment Service has never indicated to MSES that it regards these practices as causing any conflict with the pro forma statements in its Employment Security Manual, to the effect that interviewers have "authority to determine whether any educational and experiential criterion was sufficiently job-related",

App. 16a-17a, and it seems likely that every State and local employment service in the county automatically and without inquiry enforces an employer's educational and experience requirements as long as there are enough people---no matter if disproportionately white or male---to refer who meet the requirement.

The decision below effectively immunizes such conduct from judicial scrutiny. A "comparison with the appropriate cross-section of the relevant labor market" is a standard well-nigh impossible to meet. Published Census statistics do not break down educational attainments by race and occupation combined. Special Census computer runs---or door-to-door surveys---would be required. Contracting with the Census Bureau to do a special computer run on its raw data would be expensive, as would a door-to-door survey.

Moreover, such a standard is unfairly

weighted in favor of Title VII defendants. For example, the educational attainments of local factory workers in Bolivar County would certainly be skewed by the effect of Travenol's former educational requirements for such positions, and by those of other employers. In effect, plaintiffs would be required to show the disparate impact of an educational requirement by reference to a population prescreened by education. Judge Higginbotham rejected such an approach in Vuyanich v. Republic Nat'l Bank of Dallas, 505 F.Supp. 224, 356 (N.D.Tex., 1980), because it would effectively render Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed.2d 158 (1971), a "dead letter".

The effect the Fifth Circuit's rule would have on the enforcement of Title VII would be drastic. Separate suits would have to be brought against each employer with an educational or experience requirement for an

entry-level job. Census statistics would be sufficient to show the disparate impact of the requirement, infra at 31-32, but the class in each such case would normally consist only of the few persons who had applied directly with the employer. Most blacks and women harmed by the requirement would have been screened out by the local employment service before they would have had a chance to file an application; they would thus be unable to obtain any relief against the employer. If the employment agency enforcing a discriminatory requirement cannot be challenged under the same standards applicable to employers, the intent of Congress in enacting § 703(b) of the Act would be entirely thwarted. So, too, the "make whole" and "deterrent to discrimination" purposes of Title VII back pay awards would be thwarted. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L.Ed.2d 280 (1975).

Finally, this Court has several times found it necessary to address the order and shaping of proof in individual disparate-treatment cases, to provide needed guidance to the courts of appeals.[18/] The need for such guidance is even greater in classwide disparate-treatment cases and in disparate-impact cases, as the decision below makes clear.

The question of the types of evidence necessary to show the disparate impact of an objective requirement is extremely important to Title VII litigants, who must shape their proof in advance of trial and who do not have the ability to gather new types of evidence

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18/ United States Postal Service Bd. of Governors v. Aikens, U.S. , 74 L.Ed.2d 403 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 58 L.Ed.2d 216 (1978); Furnco Const. Corp. v. Waters, 438 U.S. 567, 57 L.Ed.2d 957 (1978); McDonnell Douglas Corp. v. Green, 441 U.S. 792, 36 L.Ed.2d 668 (1973).

when settled standards are changed without warning after the close of the record.

As to classwide disparate treatment, the lower court's approach merits the review of this Court because it effectively makes statistical proof of discrimination impossible. The nature of statistics is that they are a summary; any reasonably provable statistical showing will be finite, and there will always be a possibility that some other factor might make a difference in the results. If any statistical showing can be rejected on the basis of a defendant's armchair speculation as to such factors, without any requirement that the defendant offer proof to back up its speculations, then Title VII plaintiffs must either make statistical showings of discrimination so inclusive that they would be prohibitively expensive, or forego the use of statistics altogether.

The practical effects of the Fifth Circuit's decision on the private enforcement of Title VII will be large: the preparation of statistical proof in a complex class action is already expensive, routinely costing between $30,000 and $100,000; a requirement that plaintiffs take every conceivable factor into account in their showings,[19/] before the defendant is ever

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19/ As the instant case demonstrates, there is substantial danger that a court of appeals may announce radically higher standards by which plaintiffs' proof is to be judged, apply the new standards long after the record has been closed, and give plaintiffs no opportunity to meet the new standards. Cf. Albemarle Paper Co. v. Moody, 422 U.S. at 436, 45 L.Ed.2d at 307, remanding the case for a new hearing in light of the fact that the "appropriate standard of proof" had "not been clarified until today".

Without assurance of such an opportunity to meet new and higher standards announced for the first time on appeal, counsel for a class would be gambling with their client's interests to rely on the standards in effect at the time of the trial. To safeguard their case, they will have to produce every conceivable type of proof. The effect on

(footnote cont'd)

required to explain anything, would drastically reduce the ability of the private bar and of civil rights organizations to take on these actions. Because the government files only a small percentage---generally less than 3%---of the Title VII cases brought each year in the district courts, the enforcement and promise of Title VII will suffer greatly.

2. The Fifth Circuit's Rejection of Census Data as Proof of the Disparate Impact of an Educational or Other Requirement is in Conflict With the Decisions of this Court

In Griggs v. Duke Power Co., 401 U.S. at 430 n. 6, 28 L.Ed.2d at 163 n. 6, this Court relied on Census statistics to show the racially disparate impact of the educational requirement at issue there. Plaintiffs here relied on the identical type of statistics. Supra at 16 n. 10. In Dothard v.

(footnote cont'd)

trial time, and the added complexity of future cases, are unfortunate side effects to the need to protect the class.

Rawlinson, 433 U.S. 321, 330-31, 53 L.Ed.2d 786, 798 (1977), this Court relied on nationwide Census data to show the sexually disparate impact of a minimum-height requirement, and rejected the employer's claim that disparate impact could be determined only on the basis of data on actual applicants. Here, plaintiffs have also shown the effect of educational requirements on black applicants at MSES. Supra at 17 nn. 11, 12. Here, the trial court even took judicial notice of its own prior finding of the disparate impact (and lack of business necessity) for one of the most important educational requirements at issue. (App. 143a-145a).

The Fifth Circuit gave no reason for its rejection of these binding standards in the case at bar.

3. Allowing a Defendant's Unsupported Speculation to Defeat Showings of Discrimination Based on Statistics and Other Proof Conflicts With the Decisions of This Court and of Other Circuits

The common thread running through much of the Fifth Circuit's decision is that the Court each time rejected plaintiffs' showings on the basis of MSES's mere conjecture that something else might account for the racial and sexual disparities shown. There is not a shred of evidence that inclusion of any such factor would actually have made a difference in any of these showings.

The lower court's approach is in conflict with the decisions of this Court and of the other courts of appeals, rejecting the notion that plaintiffs' initial statistical showings must be universal and perfect before they shift the burdens of production and of persuasion to the defendants. In Dothard, this Court held:

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.

433 U.S. at 331, 53 L.Ed.2d at 798. In Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340, 52 L.Ed.2d 396, 418 (1977), this Court noted that statistical proof offered by a Title VII plaintiff was subject to rebuttal; the Court did not hold that conjectural problems would prevent plaintiffs from ever making out a case sufficient to shift the burden to the defendant. Plaintiffs are not required to engage in "fine tuning of the statistics". 431 U.S. at 342 n. 23, 52 L.Ed.2d at 419 n. 23.

The other courts of appeals have consistently rejected the approach which the Fifth Circuit chose to follow here. In

Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2nd Cir., 1980), cert. den., 452 U.S. 940, 69 L.Ed.2d 954 (1981), the court rejected the contention that "evidence of some weaknesses in the statistics" meant that they should be rejected. In United States v. County of Fairfax, Virginia, 629 F.2d 932, 940 (4th Cir., 1980), cert. den., 449 U.S. 1078, 66 L.Ed.2d 801 (1981), the court rejected the claim that applicant-flow figures were suspect because an affirmative action plan might have led unqualified women and blacks to apply in disproportionately large numbers:

> We cannot assume that blacks and women attracted by an affirmative action plan are more likely to be unqualified than white males who apply. If such is the case, this possible defect in the statistics is a factual matter to be proved by defendants in rebuttal of the government's prima facie case; it is not a factor which determines if a prima facie case has been proved.

In Davis v. Califano, 613 F.2d 957, 964

(D.C. Cir., 1979), the court held that plaintiffs' initial statistical presentation need not include "every conceivable factor relevant to a promotion decision", but only the minimum objective qualifications:

> The defending party, with the greater access to statistical evidence of other relevant factors, may utilize such evidence in its rebuttal presentation. (Footnote omitted).

Again, the Fifth Circuit gave no reason for its departure from these settled standards.

CONCLUSION

The petition should be granted and the decision of the Fifth Circuit should be vacated and remanded, with instructions that the court of appeals reconsider its decision in light of Griggs, Dothard, and Teamsters, that it not reject otherwise competent statistical proof on the basis of mere

conjecture, and that it decide all issues presented.

Respectfully submitted,

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July 1983

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROSIE LEE PEGUES, et al.,

Plaintiffs-Appellants,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, et al.,

Defendants-Appellees.

No. 80-3212

(April 29, 1983)

Appeal from the United States District Court for the Northern District of Mississippi

On Petition for Rehearing and Suggestion for Rehearing En Banc

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule

16) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT: HENRY A. POLITZ,
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROSIE LEE PEGUES, et al.,

Plaintiffs-Appellants,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE et al.,

Defendants-Appellees.

No. 80-3212

699 F.2d 760 (March 11, 1983)

Appeal from the United States District Court for the Northern District of Mississippi

Before WISDOM, POLITZ and TATE, Circuit Judges.

POLITZ, Circuit Judge:

Rosie Lee Pegues, Rebecca Gillespie, Mary Boyd and Robert Williams, residents of Bolivar County, Mississippi, brought suit against the Mississippi State Employment Service (MSES), John E. Aldridge, Ernest C. Lindsey, the United States Secretary of Labor, the United States Department of Labor and its division, the United States Employment

Service (USES), contending that the defendants engaged in individual and classwide discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. 42 U.S.C. §§ 1981 and 1983 and the thirteenth and fourteenth amendments to the Constitution.[1] The named plaintiffs represent a class of black and female applicants who have sought or who may hereafter seek job referrals from MSES's Bolivar County office located in Cleveland, Mississippi. After an extended bench trial, the court entered judgments dismissing both the individual and class action Title VII claims. Pegues v. Mississippi State Employment Serv., 488 F.Supp. 239 (N.D.Miss.

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1. Claims for alternative remedies for employment discrimination under 42 U.S.C. §§ 1981, 1983, and the constitutional amendments will be considered only if violations can be established on grounds different from those asserted under Title VII. Plaintiffs cite no such distinctions. We thus address only the Title VII claims. See Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir., 1982).

1980). Plaintiffs raise a plethora of issues on appeal, assigning errors of fact and law to the final judgment and two intermediate rulings. We affirm in part, reverse in part, render and remand for the fashioning of an appropriate remedy.

Procedural History

Following receipt of the requisite right-to-sue letters from the Equal Employment Opportunity Commission in January 1972, plaintiffs filed suit against the state defendants charging the MSES Cleveland office with discrimination in the classification, referral, and testing of black and female applicants for employment referral within the Bolivar County labor market. Plaintiffs charged racial and sexual discrimination in: (1) the assignment of occupational classifications to blacks and females; (2) the acceptance and servicing of certain employer job orders; (3) the administration of employment tests to

blacks; (4) the failure to refer blacks and females to available jobs; and (5) the referral of blacks and females to lower paying and less desirable jobs.

The federal defendants were joined as indispensable parties under Fed.R.Civ.P. 19(a). 57 F.R.D. 102 (N.D.Miss.1972). An amended complaint filed thereafter alleged a statewide class, and attacked regulations and guidelines promulgated by the Secretary of Labor which purportedly allowed MSES to discriminatorily classify and refer applicants, and allegedly required MSES to use employment tests developed by USES which disproportionately impacted against blacks.[2] The

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2. Plaintiffs' Title VII claims against the state and federal defendants rest on Section 703(b) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(b). This provision prohibits an employment agency, as defined in Section 701(c), 42 U.S.C. § 2000e(c), from failing or refusing to "refer for employment, or to otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."

state defendants cross-claimed, seeking indemnity from the federal defendants for any adverse money judgment based on their compliance with federally-mandated policies and procedures.[3]

A motion by plaintiffs requesting certification of a statewide class of blacks and females seeking referral from all state MSES offices, filed in 1974, was finally heard in February 1978. The court certified a class confined to persons seeking job referrals

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3. MSES, a division of the Mississippi Employment Security Commission, is a member of the national network of state employment services established by the Wagner-Peyser Act, 29 U.S.C. §§ 49 through 49K. Under the Act, federal funds in the form of grants covering operational costs are dispensed by USES to state employment services. Participating state services must adhere to USES policies and procedures, Espinoza v. Stokely-Van Camp, Inc., 641 F.2d 535 (7th Cir.), cert. denied, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), including those governing the classification, referral and testing of applicants. 20 C.F.R. §§ 653.1-653.13 (1982). During the relevant period many of these policies and procedures were set forth in the federal Employment Security Manual, a U.S. Department of Labor publication.

from the Bolivar County MSES branch.

In March 1978, the district court granted the federal defendants' motion for summary judgment,[4] ruling, inter alia, that the 1972 amendments to Title VII barred imposition of liability upon USES in the event classification, referral or testing functions performed by MSES under federal supervision were adjudged illegal. Because of the dual possibility that plenary

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4. Summary judgment was rendered in favor of the federal defendants on all claims asserted, the court having determined that: (1) Congress' omission of USES from the 1972 amendments to Title VII, Section 701(c), 42 U.S.C. § 2000e(c), as amended, manifested an intent to exonerate this entity from all potential claims of employment discrimination except those authorized under Section 717, 42 U.S.C. § 2000e-16; (2) plaintiffs had failed to exhaust their administrative remedies as a prelude to assertion of their Title VI claims, 42 U.S.C. § 2000d; (3) the United States was immune from suit under 42 U.S.C. § 1981 and the thirteenth amendment; (4) no allegation of intentional discrimination had been raised, pretermitting maintenance of a cause of action under the fifth amendment; and (5) no private right of action against the federal government could be implied from the terms of the Wagner-Peyser Act, as amended, 49 U.S.C. § 49-49k. Only the first determination is challenged on appeal.

injunctive relief could not be secured from the state defendants in the Secretary's absence, and the state might be entitled to indemnity should back-pay or attorneys' fees be assessed against it, the court declined to dismiss the state's cross-claim.

On appeal, plaintiffs challenge the district court's conclusion that referral of job applicants by the MSES office was free of race and gender discrimination. They further argue that the court erred in finding that employment tests administered by the Cleveland office were job-validated and did not impact adversely on black applicants. Plaintiffs challenge the court's admission of expert testimony on test validation, grant of summary judgment in favor of the federal defendants on the basis of the 1972 amendments to section 701(c), 42 U.S.C. § 2000e(c), and refusal to certify a statewide class.

Limitation of the Class

Plaintiffs sought certification of

a statewide class and the intervention of persons complaining of practices in MSES offices throughout the state. Finding the request untimely and concluding that a statewide class was unwieldy and unnecessary, the district court limited the class to Bolivar County and denied intervention. Appellate review of this ruling is governed by an abuse of discretion standard. Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir.), reh'g denied, 683 F.2d 417 (5th Cir.), cert. denied, U.S. , 103 S.Ct. 452, 74 L.Ed.2d (1982). Implicit in this deferential standard of review is the recognition of the essential factual nature of the certification inquiry and the district court's inherent power to manage and control pending litigation. When measured against this standard, we are not prepared to say that the district court's effort to efficiently manage this complex litigation constituted an abuse of

discretion. See McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554 (5th Cir. 1981).

Class Claims

A Title VII class action may be brought under two theories: disparate treatment or disparate impact. Either theory may prove applicable to the same set of facts. Wheeler v. City of Columbus, Miss., 686 F.2d 1144 (5th Cir. 1982). In a disparate treatment case the plaintiff class must prove the existence of a pattern and practice of race or gender-based discrimination. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Discriminatory intent must be established, by either direct or circumstantial evidence. Wheeler v. City of Columbus, Miss. Facially neutral practices which impact more severely on one group than another are subject to attack under the disparate impact theory.

Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); International Brotherhood of Teamsters v. United States. Proof of discriminatory purpose is not required in a disparate impact case.

Plaintiffs charge the MSES Cleveland office with racial and sexual discrimination in three practices: assignment of occupational codes, referrals, and testing.[5] All three practices allegedly impacted in a significantly adverse manner upon black and female applicants. Plaintiffs' cast their evidence as to each practice in the disparate impact model. However, we conclude that only the testing issue fits within this evidentiary framework.

A brief description of the operation of

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5. Evidence bearing on the interrelationship of the federal and state defendants was directed exclusively to the testing issue. Our analysis of the federal defendants' liability is thus circumscribed by the issue as joined and the evidence adduced.

the Cleveland office during the relevant period will assist in focusing the plaintiffs' class claims. This office, like all other MSES branch offices in Mississippi, functioned as a labor exchange, matching qualified applicants with available jobs. Employers make known openings by placing "job orders." Applicants make known their availability by requesting job referrals. The Cleveland office accounted for approximately 25% of all new hires in the Bolivar County labor market.

On the initial visit, each applicant was given an application form, questioned as to job preferences and directed to the interviewer who handled job codes corresponding to the preferences expressed. Until 1978, job codes were six-digit numbers representing a specific family of jobs in the federal Dictionary of Occupational Titles (DOT), a Department of Labor publication.[6]

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6. A specific six-digit numerical code (nine
(footnote continued)

(footnote continued)

digits since 1978) was assigned to each of the 20,000 job definitions incorporated in the DOT. These codes are organized into the following broad occupational categories, or families, symbolized by a single digit:

OCCUPATIONAL CATEGORIES

0/1	Professional, technical, and managerial occupations
2	Clerical and sales occupations
3	Service occupations
4	Agricultural, fishery, forestry, and related occupations
5	Processing occupations
6	Machine trades occupations
7	Benchwork occupations
8	Structural work occupations
9	Miscellaneous occupations

Subsumed within the nine major job families are more than 82 diverse, two-digit divisions. The families of particular importance in this case, the clerical and sales, service, and agricultural codes, are subdivided into a variety of occupations:

CLERICAL AND SALES OCCUPATIONS

20	Stenography, typing, filing, and related occupations
21	Computing and account-recording occupations
22	Production and stock clerks and related occupations
23	Information and message distribution occupations
24	Miscellaneous clerical occupations
25	Sales occupations, services
26	Sales occupations, consumable commodities
27	Sales occupations, commodities, n.e.c.
29	Miscellaneous sales occupations

(footnote continued)

(footnote continued)

SERVICE OCCUPATIONS

30 Domestic service occupations
31 Food and beverage preparation and service occupations
32 Lodging and related service occupations
33 Barbering, cosmetology, and related service occupations
34 Amusement and recreation service occupations
35 Miscellaneous personal service occupations
36 Apparel and furnishings service occupations
37 Protective service occupations
38 Building and related service occupations

AGRICULTURAL, FISHERY, FORESTRY AND RELATED OCCUPATIONS

40 Plant farming occupations
41 Animal farming occupations
42 Miscellaneous agricultural and related occupations
44 Fishery and related occupations
45 Forestry occupations
46 Hunting, trapping and related occupations

These subdivisions are in turn broken down into specialized fields. For example, included within the first division under the clerical and sales code, stenography, typing, filing, and related occupations, are:

201 Secretaries
202 Stenographers
203 Typists and typewriting-machine operators
205 Interviewing clerks
206 File clerks
207 Duplicating-machine operators and tenders
208 Mailing and miscellaneous office machine operators

Once routed to the appropriate interviewer, the applicant was assisted in completing the application form, and questioned about education, vocational training, work experience, skills, work preferences, and personal interests and characteristics. Based on this information, the interviewer selected and inscribed the appropriate DOT code on the application. Work experience was a primary consideration in the coding process, although other factors were weighed, including the types of employment available in the area. The code issued an applicant who was not fully qualified, lacked the requisite experience, or needed further training, included an "x."

The interviewer's duties included the processing of employer job orders. A typical order contained information from the employer concerning the job, the number of vacancies, the desired number of referrals per vacancy, and the education and experience thresholds required. Interviewers had authority to

determine whether any educational and experiential criterion was sufficiently job-related, and if not, whether further investigation was necessary before the job order was processed. Interviewers were encouraged to dissuade employers from imposing arbitrary hiring requirements, and job orders discriminating on the basis of sex or race were not to be serviced by MSES personnel. After obtaining the necessary information, the interviewer coded each job vacancy listed in the job order.

The matching and referral decision was facilitated by tests designed to ascertain job capabilities. In the absence of a sufficient number of applicants with a code identical to a job order, applicants with codes within the occupational family were referred. The discretion of the interviewer was unavoidably involved in this process.

Plaintiffs introduced extensive

documentary and testimonial evidence designed to show that the state defendants discriminated in the classification and referral of blacks and women, contrary to federally prescribed policies. Implicit in this claim is the contention that the interviewers abused their discretion in coding and referring. Plaintiffs also endeavored to prove that the battery of tests, albeit uniformly administered without regard to race, operated disproportionately to exclude blacks.

Because the classification and referral practices complained of effectively turn on discretionary decisions, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied. Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (5th Cir. 1982); C. Sullivan, M. Zimmer and R. Richards, Federal Statutory Law of Employment Discrimination, § 1.5(c) (1980).

Selection processes which rely on subjective judgments, despite the corraling by objective standards, provide the opportunity for the intentional discrimination cognizable in a disparate treatment action. See Payne v. Travenol Laboratories, Inc. We must therefore analyze plaintiffs' challenge to the classification and referral systems under the disparate treatment modality. Their challenge to the aptitude tests, generally regarded as neutral selection mechanisms, will be evaluated under the aegis of the disparate impact theory.

I. CLASSIFICATION AND REFERRAL

As noted, we evaluate the classification and referral claims under the disparate treatment theory, which requires proof of discriminatory animus. To prevail, plaintiffs must demonstrate more than "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [Rather they

must show] by a preponderance of the evidence that discrimination was the [defendants'] standard operating procedure---the regular rather than the unusual practice." International Brotherhood of Teamsters v. United States, 431 U.S. at 336, 97 S.Ct. at 1854. A prima facie case may be established by the use of statistics if a sufficiently substantial, or "gross," disparity in the treatment of the favored and disfavored groups can be shown. Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). In such cases statistical disparities, standing alone, may justify an inference of discriminatory motive. International Brotherhood of Teamsters v. United States; Payne v. Travenol Laboratories, Inc. Moreover, as we stated in Payne:

> The statistical showing of a disparate result may also be buttressed with evidence of a history of discrimination practiced by the employer, individual instances of discrimination, and opportunities

> to discriminate that exist in the employer's decision-making processes. If the statistical disparity is insufficient alone to establish a prima facie case, the plaintiff may get over his or her initial hurdle by combining statistics with historical, individual, or circumstantial evidence. (Citations omitted.)

673 F.2d at 817.

Should the plaintiff succeed in establishing a prima facie case, the defendant may overcome the presumption of discrimination thus raised by discrediting the plaintiff's statistical evidence or by advancing a nondiscriminatory rationale for what appeared to be discriminatory conduct. Wheeler v. City of Columbus, Miss.; Williams v. New Orleans Steamship Ass'n, 673 F.2d 742 (5th Cir.), reh'g denied, 688 F.2d 412 (5th Cir. 1982). Affirmations of good faith selection of the most qualified applicant will not satisfy this burden. Failure by defendants to rebut a prima facie case warrants the conclusion that Title VII has been

violated.

Statistical evidence must be regarded with a substantial degree of caution. See, New York Transit Auth. v. Beazer, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); Pouncy v. Prudential Ins. Co. of America. Although competent to prove employment discrimination, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances." International Brotherhood of Teamsters v. United States, 431 U.S. at 340, 97 S.Ct. at 1856. We have repeatedly warned of the need for considered and refined statistical analysis in the context of Title VII class actions. Pouncy v. Prudential Ins. Co. of America; Rivera v. City of Wichita Falls; Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), vacated and remanded,

U.S. , 103 S.Ct. 34, 74 L.Ed. 2d 47 (1982), aff'd on remand, 695 F.2d 134 (5th Cir. 1983).

Discrimination in Classification

Plaintiffs presented quantitative evidence of the disproportionate classification of blacks and women in stereotypic, less remunerative occupations during selected years between 1970 and 1976. No testimony, lay or expert, was offered to explain the significance of this data, nor was an appropriate test of statistical significance applied. Evidence of individual instances of discriminatory treatment of blacks and women during the classification process, and of the state defendants' noncompliance with federal directives, was also introduced. Without indicating whether such evidence, in the aggregate, sufficed to make out a prima facie case of discrimination, the district court concluded that plaintiffs had

failed to sustain their ultimate burden of proof under an impact theory.[7]

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7. There are no findings or conclusions set forth in the district court's opinion to support its rejection of plaintiffs' classification and referral claims, other than a detailed recitation of federal policies and regulations governing MSES's classification and referral functions, a discussion of the limited role of the Cleveland office in placing applicants, and general efforts made by MSES staff to obey the civil rights laws, the excellent relationship between the Cleveland office and the black community, and a conclusionary statement that the state defendants had at all times sought to classify and refer applicants without regard to race or sex. It is nonetheless clear, from the court's extensive and somewhat laudatory exposition of defendants' case, that it did not deem plaintiffs' evidence to be either credible or probative of discrimination. 488 F.Supp. at 243. Handicapped though we are by the dearth of specific factual findings, we proceed, in light of the recent death of the trial judge and the substantial passage of time since the inception of the lawsuit, to decide this case in the interests of justice and judicial economy. See Felder v. United States, 543 F.2d 657 (9th Cir. 1976).

Cognizant of the preferred practice of remand, we are loathe to return this voluminous record, including thousands of pages of testimony and myriad exhibits, to another trial judge for a transcript review. We may perform that function under circumstances as here presented, particularly since we find that the record is susceptible of only one resolution of the factual issues presented. United States v. Georgia Power Co., 695 F.2d 890 (5th Cir. 1983).

Several charts were offered to show a disproportionate classification of blacks in codes for less desirable service occupations, and of women in lower paying jobs. These exhibits reflect imbalances, but do not show that race or sex, rather than work preferences, experience, education, and the state of the job market caused the imbalances. As thus presented, these figures are of little probative value. D. Baldus & J. Cole, Statistical Proof of Discrimination, § 1.22[23] (1980).

At first glance, two related series of exhibits focusing on race in the classification of persons of equivalent education appear illuminating. Upon closer examination, the probative value dims.

In the first series, one exhibit reflected that in 1970, 90 black women and one white woman, all with at least eight years of education, were coded for domestic labor. Other

exhibits portrayed a continuation of this trend, to a lesser degree, in 1972, 1974 and 1976. Work preferences were identified for 1970 only; of the 44 coded as maids that year, 28 opted for non-domestic work. There was no analysis of this data and no quantification of the white women in the pool who received more desirable codes. The records do not show job preferences for 1972, 1974 and 1976, an omission which detracts from the weight of the figures and militates against any meaningful comparison of the races.

The second series of exhibits, organized according to educational levels, contrast black and white classifications for the year 1974. One exhibit reveals that 265 black women with an elementary school education, constituting 2/3 of the females in this category who applied in 1974, were coded for service occupations, while only 16 white women were similarly coded. Twelve black

and 9 white women in this cross-section of 1974 applicants were assigned the clerical and sales code characteristically dominated by whites; 2 black and 0 white women were assigned codes within the professional, managerial and technical category. Past experience, work preference, and the availability of alternate jobs at the time of interviewing, information which is contained in the record, were not compiled or considered by the plaintiffs. Nor were the figures subjected to statistical analysis.

The same comparative analysis was employed with respect to the classification, in 1974, of black and white men with no more than a seventh grade education. Again, such critical variables as epxerience, work preference and jobs available at the time each applicant was interviewed were not incorporated in the data, nor was statistical methodology utilized to discount the

possibility that apparent racial discrepancies were not due to random selection.

Substantial disparities in the assignment of service or farmwork codes to black and white men with an education at or above the eighth grade level were also shown pursuant to this analysis. Occupational preferences and job availability were again omitted. Work histories, although measured by the data, were widely divergent. No statistical test of significance was used to evaluate these disparities.

In the final series of exhibits, raw data in the form of seven charts, each of which lists the name, education, work preference and experience of applicants of a specific race/sex group, together with the codes assigned in the years 1970 and 1974, were offered. Plaintiffs produced no evidence which explained or collated this data for purposes of comparison between favored

and disfavored groups. The particular variant or variants to be compared among such groups was not disclosed. Scrutinizing these charts for differences in the classification of similarly qualified blacks and whites, or males and females, within a certain code, discloses that there is no indication of the size of the total applicant pool and the porportion thereof of each group. None of the recognized tests of statistical significance were performed in an attempt to demonstrate the unlikelihood that differential coding could be ascribed to chance rather than race or gender.

Reasoned assessment of disparities in classification of blacks and females evinced in these exhibits thus cannot be made. While precise calculations of statistical significance are not essential to statistical proof, Hazelwood School District v. United States, no valid conclusions

regarding the relationship of observed selection patterns to the defendants' behavior can be drawn absent some minimal framework for analysis. Plaintiffs bear this burden. See Rivera v. City of Wichita Falls; Vuyanich v. Republic Nat'l Bank of Dallas, 505 F.Supp. 224, 234 (N.D.Tex. 1980); A. Smith and T. Abram, Quantitative Analysis and Proof of Employment Discrimination, 1981 U.Ill.L.Rev. 33. Mindful though we are that simple comparisons of percentages are acceptable where a strong inference of discrimination has previously been raised, Rivera v. City of Wichita Falls, such is not the case here. No pattern or practice of discriminatory treatment is otherwise established by a combination of plaintiffs' anecdotal and statistical evidence. It is not for the court, trial or appellate, to search the voluminous record for data omitted from plaintiffs' comparative analyses, compensate

for the failure to filter out the combined effects of factors unrelated to race or sex, choose the appropriate statistical methodology, and insert therein select parts of the array of figures presented. See Miller v. Weber, 577 F.2d 75 (8th Cir. 1978). See generally Wilkins v. University of Houston.[8]

Discrimination in Referral

To establish a prima facie case of discrimination against class members in referrals, plaintiffs offered statistics, bolstered by historical, anecdotal and circumstantial evidence, to demonstrate that defendants disproportionately excluded qualified black and female applicants from employment opportunities. This comparative evidence was based on the assumption that all persons with the same job code were similarly

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8. Because we conclude that plaintiffs have failed to make out a prima facie case, we need not consider defendants' rebuttal evidence. See Pouncy v. Prudential Ins. Co. of America.

qualified for a particular occupation.

Plaintiffs first took aim at defendants' alleged practice of servicing discriminatory sexual preferences of employers. They offered evidence of a pattern of sexually segregated referrals to a major local employer, Travenol Laboratories, during the period December 1969 - May 1970. Women were referred exclusively to lower paid assembler jobs, and men to better paid material handler jobs, in statistically significant numbers.[9] Both were entry-level positions, demanding no special skills or training.

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9. The statistical disparities in this example approach the "inexorable zero" decried by the Supreme Court in International Brotherhood of Teamsters, 431 U.S. at 342 n. 23, 97 S.Ct. at 1858 n. 23. Standard deviation analysis was applied to these disparities to eliminate chance as a likely explanation for the revealed underrepresentation. Hazelwood School Dist. v. United States; Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). As defined in Castaneda, the standard deviation quantifies the probability that chance is responsible for

(footnote continued)

(footnote continued)

any difference between an expected outcome and the observed outcome in a sample comprised of a protected and nonprotected group (a binomial distribution). 430 U.S. at 496 n. 17, 97 S.Ct. at 1281 n. 7. As the number of standard deviations increases, the probability of chance as the cause of any difference between the expected and observed results diminishes. EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), reh'g denied, 680 F.2d 965 (4th Cir.), cert denied, U.S. , 103 S.Ct. 235, 74 L Ed.2d 186 1982). Generally speaking, in a sample equivalent in size to that evaluated in Castaneda, a difference between expected and observed values in excess of two or three standard deviations at the 5% significance level permits an inference of discrimination. See Harrell v. Northern Elec. Co., 672 F.2d 444 (5th Cir.), modified on reh'g, 679 F.2d 31 (5th Cir.), cert. denied, U.S. , 103 S.Ct. 449, 74 L.Ed.2d (1982).

In Harrell, 672 F.2d at 447 n. 5, we set forth a formula for computing standard deviations based on the Castaneda model. We delete therefrom the .5 correction factor used to compensate for Harrell's sample size, and specially note a publication error in the reproduction of the formula---the square root sign in the denominator was omitted. The correct formula for determining the number of standard deviations is:

$$\frac{NP - X}{\sqrt{NPQ}}$$

Tailored to the facts presented in the case at bar, N = total number of applicants referred; P = percentage of female applicants; and Q = percentage of male applicants.

Application of the formula to plaintiffs' data discloses that the difference between the expected and the observed number of women referred to Travenol

(footnote continued)

These statistical disparities gain added dimension when examined in the context of evidence that the Cleveland office accepted job orders in which the employer's gender preference was expressed. Also relevant in this regard are two admonitions issued by the Department of Labor in June 1968 and May 1969, ordering the Cleveland branch to cease the servicing of discriminatory employer sex preferences, and to investigate the validity of such preferences and record the results.

(footnote continued)

Laboratories' material handler jobs exceeded 17 standard deviations. Expected versus observed numbers of women referred to the female-dominated assembler jobs differ by more than 13 standard deviations. Both figures exceed the two or three standard deviations considered sufficient to undermine chance as the reason for the disparity.

Plaintiffs presented evidence of sex and race segregated referrals during a 14-month interval commencing November 1969, but failed to draw the requisite comparison between favored and disfavored groups, or to control for divergent qualifications possessed by applicants within either group. Accordingly, this evidence can at best be characterized as inconclusive, and does not function to enhance plaintiffs' prima facie showing.

The office did not investigate the suspect job orders processed after receipt of the Department of Labor's admonitions.

Plaintiffs also challenged defendants' systematic referral of applicants to positions other than those for which they were classified. In 1970, of the 68 persons referred out-of-code to the more attractive clerical and sales occupations, 58 were white. Eight of these individuals were overqualified according to their assigned code and may therefore be eliminated. In contrast, only 10 black persons were similarly referred, three overqualified. Conversely, of the 68 applicants referred out-of-code to less desirable service employment, 24 were white, three overqualified, and 34 black. These categories are further divided to show that 20 of the 21 white women referred to service jobs were matched with employers seeking waitresses, while 26

of the 34 black women receiving service referrals were accorded opportunities for stereotypical domestic or cook positions.

Cognizant of the lessened probative value of statistical evidence where the sample size is small, due to the incremental increase in the possibility of sampling error, we must nonetheless guard against an overly facile rejection of discrimination claims. Two conflicting interests must be weighed: the danger of prejudice to the defendant posed by drawing inferences of discrimination from evidence consisting of a handful of selection decisions, and the unfairness to the Title VII claimant of imposing unattainable standards for proof of discriminatory intent. EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), reh'g denied, 680 F.2d 965 (4th Cir.), cert. denied, U.S. , 103 S.Ct. 235, 74 L.Ed.2d 186 (1982). Given our conclusion that a discriminatory pattern of sexually disparate

referrals for a portion of 1970 has been demonstrated, we are satisfied that the evidence bearing on out-of-code referrals may properly serve to strengthen the prima facie case of discriminatory treatment.[10]

Plaintiffs next assail the state defendants' selection of applicants for referral on the basis of unvalidated educational requirements. As to the educational requirements, plaintiffs rely upon charts detailing what plaintiffs deem to be unreasonable minimum education requirements of certain employers for various job vacancies in 1970 and 1976, together with census data revealing lower levels of education among blacks and

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10. We have determined that one of the named plaintiffs, Rebecca Gillespie, proved an individual claim of disparate treatment in the context of referral. See slip op. p. 2983, p. , infra. Under the Teamsters analysis, this proof suggests a qualitative explanation for the prima facie showing heretofore made for 1970 on the basis of statistical and historical evidence. See Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981).

women in Mississippi. The lay witness who compiled these charts acknowledged employing her subjective judgment with respect to the reasonableness of a given educational requirement. A similar study on the experience requirements was likewise based on this witness' subjective determination of reasonableness. These rudimentary analyses did not purport to gauge the impact, in numerical terms, upon black and female applicants in Bolivar County by comparison with the appropriate cross-section of the relevant labor market. Absent proof of disparate impact, no invidious discrimination can be shown under the disparate treatment theory. Pouncy v. Prudential Ins. Co. of America; Rivera v. City of Wichita Falls.

Pointing to evidence that a disproportionately smaller percentage of black men and women were referred to available positions in 1970 than their concentration in

various referral pools (all applicants with a code corresponding to that of the job to which referrals were made) would justify, plaintiffs employed the standard deviation test approved in Castaneda v. Partida to show that the difference between actual and expected numbers of blacks referred was statistically significant. After painstaking study of the record, we conclude that the underlying data used to evaluate racial disparities in referrals of black men and women to clerical and sales occupations is so seriously flawed as to negate plaintiffs' suggestions of statistical significance.

The computational errors which undermine the value of calculations pertaining to the clerical and sales occupational codes are not extant in the other eight codes. However, the calculations as to these eight are not persuasive; they all fail to incorporate the primary factor influencing referral---

experience. There is no basis in the record for discounting the obvious significance of this factor. Absent due consideration of the experiential component of the referral decision, plaintiffs' standard deviation analyses furnish insufficient support for the proposition that defendants' referral decisions were tainted by racial bias.

Statistical evidence drawing comparisons between mean hourly rates of pay per referral, and encompassing referrals to occupations in all nine DOT code families from 1974 through 1978, was presented to demonstrate that average wages for black and female referrals were exceeded, in statistically significant proportions, by average wages for white and male referrals. Based on this data, plaintiffs' expert, Dr. Charles Mann, testified that application of a "two-tailed" test of significance, designed to determine whether differences in the mean

hourly wages of black, white and female referrals were statistically significant for the years 1974-1978, produced positive results. Dr. Mann's computations would appear to support an inference that the probability that protected group members were referred, on the average, to less remunerative employment because of chance alone was extremely small.

Albeit impressive, Dr. Mann's computations do not take into account the relative qualifications of persons referred during the relevant period. The referral pools upon which his analyses rest were not arranged so as to eliminate those who were denied referral to better paying positions because of the lack of necessary ability or skills. Pouncy v. Prudential Ins. Co. of America; Rivera v. City of Wichita Falls. Dr. Mann's model is grounded on the unfounded assumption that all persons were qualified for referral to higher paid jobs.

A more meaningful analysis would have compared minority and nonminority mean salaries for referrals falling within a single code family. This approach would have disclosed whether black and female applicants possessing education, experience and skills equivalent to those of their white and male co-applicants, were referred in disproportionate numbers to lower paying occupations. Because the raw data is deficient for failing to recognize that "a number of factors operate simultaneously to influence the amount of salary" associated with a particular referral, Wilkins v. University of Houston, 654 F.2d at 402, the findings of statistically significant disparities derived therefrom will not permit an inference of discrimination.[11]

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11. Plaintiffs concentrated much of their effort at trial on statewide data covering an undefined period culminating in March 1976, purportedly showing strong racial and gender disparities in

(footnote continued)

Plaintiffs contend that statistically significant discrepancies in the frequency of referrals for whites and blacks during the years 1974 through 1978 has been established. These data tell us nothing of the relative qualifications of blacks and whites in the available applicant pools, or of the requirements imposed by the employers to whom referrals were made. Factors other than race may explain the variations in referral rates observed. To conclude otherwise would necessitate an impermissible degree of speculation.

(footnote continued)

the pay rates of jobs to which referrals were made by each of the 82 branch offices within the MSES system. Dr. Mann testified, based on his performance of an accepted statistical test, that such disparities were statistically significant. Given our approval of limitations imposed by the district court on the scope of the class, such data has no relevance to the practices of the Cleveland office. Since the pertinent data have not been dissected out from those relating to other offices, Dr. Mann's statewide analyses are without probative value on the issues posited in this litigation.

There remains for consideration plaintiffs' claim that discrimination pervaded defendants' job development process, which entailed MSES solicitation of employer job orders on behalf of specific applicants for whom the office had no suitable openings. Job development could be undertaken for persons who either possessed unusual skills or training or who were difficult to place due to the paucity of jobs they could perform. A chart excerpting selected portions of defendants' evidence shows that on various dates during July 1974 through August 1978, the local office's self appraisals indicated that the percentage of black placements linked to job development was lower than the percentage of black applicants.

Plaintiffs' failure to narrow the applicant pool to those presumptively eligible for participation in the job development process, as above defined, prevents the comparison of

the number of blacks qualified for job development to the number receiving this service. We are not unmindful that defendants' reliance on the subjective judgment of their interviewers in arriving at a decision on specific job development casts doubt on the legitimacy of the process, Payne v. Travenol Laboratories, Inc., but are not persuaded that this element of subjectivity overcomes the fundamental defect in plaintiffs' figures. Standing alone, therefore, these statistics have insufficient probative value.

Defendants' Rebuttal

Much of the state defendants' statistical evidence, introduced through their expert, Dr. Linda Malone, was devoted to rebutting Dr. Mann's calculations of statistical evidence. Her analyses related to applicant rates of referral and mean salaries for the years 1974 through 1978, and did not address plaintiffs' prima facie proof of

discrimination in servicing of employer sex preferences between November 1969 and mid-1970, and out-of-code referrals in 1970. Given our rejection of Dr. Mann's statistical presentation and the restricted scope of defendants' rebuttal statistics, we need not review the probative value of Dr. Malone's studies.

This leads to our determination whether defendants' remaining evidence, primarily qualitative in nature, adequately counters plaintiffs' prima facie showing. First, as to evidence of sex-segregated referrals to Travenol, defendants contend that they subsequently terminated this practice. Second, defendants claim that five of the 36 employer gender preferences serviced by the Cleveland office were patently reasonable. Notwithstanding these assertions, the record contains no explanation for the different treatment accorded females and thus does not

shield the defendants from the consequences of their discriminatory practice.

Finally, defendants maintain that their conduct cannot be scrutinized in a vacuum, insisting that overwhelming evidence of their good faith efforts to assist black and female applicants within the confines of a depressed labor market mitigates against a finding of discrimination. Any ostensible discrepancies in the referral rates of members of the protected classes must, in their view, be attributed to the essentially rural character of the area and the severe educational and experiential deficiencies characteristic of Bolivar County's predominantly black population.

We have no doubt that the poor socio-economic conditions endemic to Bolivar County, fostered in part by the displacement of black agricultural workers following the mechanization of farm labor in the 1960s, predetermined work patterns in the area. MSES's Cleveland office endeavored to cope with the

resultant influx of uneducated and unskilled persons seeking employment by instituting comprehensive job training programs and, in the words of the district court, by doing "what they could by way of classification and referral to try to help the applicants obtain whatever suitable work might be available, without regard to ... race or sex." 488 F.Supp. at 245. It is likewise important to note that disparities in referrals of whites and blacks have been steadily narrowing over the years. Payne v. Travenol Laboratories, Inc.

Guided by Teamsters, however, we are not persuaded that such affirmations of good faith, coupled with evidence of improvement in referrals of black applicants, overcome plaintiffs' prima facie proof of sex and race-based discrimination during 1969-70. Accordingly, plaintiffs are entitled to judgment on their claim of classwide sex

discrimination during the limited period for which a pattern of disparate treatment was established. This cause shall be remanded for the fashioning of an appropriate remedy for the infractions occurring during the relevant 1969-70 period.

Discrimination in Testing

All MSES offices utilized certain vocational aptitude tests, developed and supplied to them by the Department of Labor through the USES. Three forms of test batteries are challenged: S-28 Tableworker, S-270 and S-270R Licensed Practical Nurse, and S-282 and S-282R Nurse Aide. Each of these batteries, termed a Specific Aptitude Test Battery (SATB), is comprised of two or more aptitudes measured by the General Aptitude Test Battery (GATB). Binding prescriptions for state agency use of the tests have been promulgated by the Department of Labor, and are set forth in Part II of the Employment Security Manual, Sections 9000-9999.

Since 1947, the Department of Labor has distributed differing versions of the SATB and GATB tests to the state employment services. Throughout the ensuing years USES has been engaged in research aimed at validating these tests for minorities. After the Supreme Court's decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), USES undertook a comprehensive revalidation program. An interim policy was instituted in the fall of 1972 to monitor state testing, pending completion of the revalidation program. This policy mandated the referral of minority group applicants in "not less than the same ratio as the minority group represented in the applicant flow in the local office area, provided there is a sufficient number of applicants who are otherwise qualified, consistent with Federal law." MSES' administration of S-28 was

governed by the interim policy until January 1973;[12] the LPN and Nurse Aide tests were thus regulated until the revalidation process was completed in the mid-1970s.

Title VII permits the administration of "any professionally developed ability test" on the condition that such test is not utilized to discriminate against persons protected by the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(h). Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). This selection technique must be evaluated pursuant to the disparate impact model. A plaintiff may establish a prima

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12. Tests that have been differentially validated or which did not appear to significantly impact upon blacks in a discriminatory manner were removed from the interim policy's strictures in January 1973. Although the S-28 Tableworker battery had last been validated in 1954, it was considered by USES to exert no adverse racial impact.

facie violation by demonstrating that a facially neutral examination exerts "a significantly discriminatory impact." Connecticut v. Teal, U.S. , 102 S.Ct. 2525, 2531, 73 L.Ed.2d 130 (1982).

If such an impact is demonstrated, whether by statistics or other evidence, the defendant is called upon to show that the examination is job-related, or bears "'a manifest relationship to the employment in question.'" Id. (quoting from Griggs v. Duke Power Co., 401 U.S. at 432, 91 S.Ct. at 854). The proponent of the test must establish its job performance validity. Ensley Branch of the N.A.A.C.P. v. Seibels, 616 F.2d 812 (5th Cir. 1980), cert. denied, 449 U.S. 1061, 101 S.Ct. 783, 784, 66 L.Ed.2d 603 (1981); Scott v. City of Anniston, Alabama, 597 F.2d 897 (5th Cir. 1979), cert. denied, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). If the defendant offers persuasive evidence, the

plaintiff may still prevail by proving that the use of the test was merely pretextual, Connecticut v. Teal, or that less discriminatory alternatives existed. Albemarle Paper Co. v. Moody.

To prove their claim that the Tableworker, Nurse Aide and LPN tests excluded disproportionate numbers of blacks from referral, plaintiffs introduced statistical evidence comparing failure rates of white and black applicants. The district court determined that plaintiffs' proof did not establish a prima facie case of disparate impact, due principally to their mischaracterization of certain scores. 488 F.Supp. at 253.

Looking first to the possible impact of the S-28 examination, the pertinent data reflect that in 1971, 13 whites and 32 blacks scored "below norm." However, no perceptible barriers to referral existed for recipients of scores in the higher "below norm" range.

We thus lack a reliable statistical base from which to assess the significance of the observed disparity. See Connecticut v. Teal; Albemarle Paper Co. v. Moody.

A different approach was adopted by plaintiffs in an attempt to convince the district court that blacks were test-selected for referral to nurse's aide training at a county hospital in disproportionately fewer numbers than other applicants. From 1971 through 1976, 180 blacks (11.3%) and 278 persons of other racial or ethnic backgrounds, primarily white (49.3%), all of whom were classified under the nurse aide code, were referred to the hospital's training program. Application of the standard deviation formula to these figures by plaintiffs' expert, Dr. James Outzz, confirmed that the racial difference was statistically significant.

It is well settled that a plaintiff need not establish the adverse impact of an

aptitude test solely on the basis of comparative pass/fail rates of blacks and whites, but may proffer statistical proof of differences in the proportions of blacks and whites gaining entry to the desired employment opportunity. Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396, 637 F.2d 506 (8th Cir. 1980); James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), cert. denied, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976). Notwithstanding this rubric, the referral component of the applicant pool must be tied to test selection, the variable to be measured, before referral rates may be used as indicia of failure.

As the district court aptly observed, Dr. Outzz had no knowledge of whom among those referred had taken the nurse aide test.

Because the SATBs were developed to facilitate referral of inexperienced, untrained and entry level workers to skilled positions, they were not administered to experienced applicants who had manifested some proficiency in the occupation examined.[13] Information identifying members of the applicant pool tested, their scores, and their subsequent referral or nonreferral was available to plaintiffs, but was not collated. In light of this critical omission, we decline to infer from the opaque figures presented that all applicants referred to nurse's aide training were first required to take the S-282.

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13. Despite the district court's finding that Rebecca Gillespie, an experienced nurse's aide, had erroneously been required to undergo testing, there was no evidence that other experienced candidates for referral to the nurse aide training program, whether white or black, were similarly treated. We therefore attach no signifance to this isolated incident in analyzing plaintiffs' classwide data pertaining to nurse aide referrals.

A survey of S-270R scores of applicants assigned the licensed practical nurse code in the years 1970, 1972, 1974 and 1976, shows that of the 66 persons completing the S-270R battery, 13 of 29 blacks and 0 of 37 whites received a failing score. Test performances of 2 black and 2 white applicants are omitted. One black woman, tested by another agency, was referred to the county hospital for training. Plaintiffs describe the sample of applicants tested at one point as composed of 75 persons; at another point they refer to 62 persons.

Since the outlines of the relevant sample are imprecise, the majority and minority concentrations cannot be ascertained as a prelude to application of probability theory. Addition of the four persons for whom no data is available further distorts the figures. Where the sample size is small, a few test scores may significantly skew the overall disparity, thus reducing the

reliability of any inference which might be drawn from minority "fail" rates.

While the small size of the sample does not necessarily justify repudiation of plaintiffs' empirical analysis, we perceive none of the evidentiary signals of discrimination typically relied upon to bolster such analyses. S. Booth and J. McKay, Legal Constraints on Testing and Evolving Trends in The Law, 29 Emory L.J. 121, 157 (1980); see, e.g., James v. Stockham Valves and Fittings Co. Compare Rivera v. City of Wichita Falls (14 of 35 Mexican-Americans who applied in 4-year period failed employment test, statistically significant showings of adverse impact alone deemed sufficient to make out prima facie case); Wilkins v. University of Houston (issue of applicability of statistical methodology to small number of positions, 14, not resolved inasmuch as diverse and specialized credentials required).

Regardless of whether the injection of the element of uncertainty attributable to the size of the minority sample alone warrants rejection of plaintiffs' data, we are compelled to the view that this factor, in conjunction with the other problems above noted, preclude a reasoned evaluation of this data. We therefore perceive no prima facie case of disparate impact resulting from the administration of the S-270R test.

When viewed in the aggregate, the statistical evidence supports the district court's finding that the tests under consideration were not discriminatory in their impact upon black applicants. Absent proof that an employment test exerts a substantially disproportionate racial impact, no inquiry may be undertaken into its job relatedness, or validity. See Albemarle Paper Co. v. Moody; Rivera v. City of Wichita Falls; Moore v. Southwestern Bell Tel. Co., 593 F.2d 607

(5th Cir. 1979).[14]

Individual Claims

The four named plaintiffs, all of whom are black, appeal the district court's determination that they had not been discriminated against by the state defendants. In order to establish a prima facie case of disparate treatment, each plaintiff must prove: (1) membership in a protected group; (2) application and coding for an occupation for which the Cleveland office was making referrals; (3) failure to secure a referral; and

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14. Because we affirm the district court's determination that the disputed tests produced no disparate impact upon black referral candidates during the years involved in plaintiffs' studies, we do not address plaintiffs' averment that the state defendants transgressed USES's interim policy in administering the nurse aide and licensed practical nurse examinations beginning in September 1972, or the challenge to expert testimony on the job-validation issue. Nor is it necessary for us to reach the question whether the district court erred in construing the 1972 amendment to Section 701(c) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e(c), to relieve USES of putative liability for discriminatory testing. The question remains for another day.

(4) later referral of a nonmember of the protected group. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Upon the plaintiff's establishment of a prima facie case, the defendants are called upon to dispel the presumption of discriminatory treatment thus created by articulating a legitimate, nondiscriminatory reason for the particular plaintiff's treatment. If the defendants come forward with such proof, the plaintiff, who at all times retains the burden of persuasion, may demonstrate that the justification proffered by defendants was a mere pretext designed to conceal discrimination. This goal may be achieved either by proving that a discriminatory reason more likely motivated the defendants' action, or by discrediting the defendants' articulated

explanation. Texas Department of Community Affairs v. Burdine.

Applying the McDonnell-Douglas test, as modified, to the district court's findings of fact, 488 F.Supp. at 241-242, we conclude that three of the named plaintiffs, Pegues, Williams and Boyd, failed to adduce prima facie proof of intentional discrimination.[15] Although we attach no significance to the inability of plaintiffs to cite the referral of any similarly or less qualified male and/or white to positions to which they believe they should have been referred, they were obligated, at a minimum, to introduce evidence attesting to the availability of a position for which they were coded but were not

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15. Consistent with Pullman-Standard v. Swint, U.S. , 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), we may reverse a district court's finding on the question of discriminatory intent only if we are satisfied that this finding is clearly erroneous. Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982). We are not prepared to say that the district court's factual findings with respect to the claims of Pegues, Williams and Boyd are clearly erroneous.

referred. See Harrell v. Northern Elec. Co., 672 F.2d 444 (5th Cir.), modified on reh'g, 679 F.2d 31 (5th Cir.), cert. denied, U.S. , 103 S.Ct. 449, 74 L.Ed.2d (1982). We discern no such evidence in the record.

As to Rebecca Gillespie, however, we find that a prima facie case has been demonstrated. Gillespie was a black female with an eighth grade education and experience as a waitress, maid and factory worker. She first applied to the Cleveland office in 1968, and expressed a desire for anything but domestic labor, including in particular a job at Travenol Laboratories. Notwithstanding her background and stated preference, she was coded for service work. Upon earning a 10th grade GED certificate in July 1971, and being aware of Travenol's educational criterion, she advised the Cleveland office of her achievement and repeated her request for a factory referral. Her coding was not

re-evaluated in light of this pertinent change in circumstances. Defendant Lindsey testified that the office was still engaged in referring applicants to Travenol at the time of Gillespie's July 1971 visit. Although not formally rejected, Gillespie was passed over in favor of other, similarly qualified applicants, some of whom were white.

By way of rebuttal, defendants elicited testimony from Gillespie as to her five full-term pregnancies between 1970 and 1975, and various benefits in the form of training and referral that defendants had conferred upon her between 1968 and 1970. The record reflects that at this time Travenol relied exclusively upon MSES referrals to fill vacant factory positions. Therefore, Gillespie could not have secured a position without assistance from the Cleveland office. Given her factory experience and enhanced education,

we do not believe the reasons articulated constitute a legitimate rationale for defendants' failure to reconsider her service classification and provide an opportunity for employment at Travenol. She is entitled to relief.

Conclusion

We conclude that plaintiffs succeeded in establishing a pattern and practice of race and sex-based disparate treatment during 1969 and 1970. We further conclude that Rebecca Gillespie has sufficiently proven her individual claim of discrimination. We render judgment accordingly, thus modifying the decision of the district court which, in all other respects, is affirmed. We remand for entry of a decree on liability in accordance herewith, and for further proceedings as may be deemed necessary for the fashioning of an appropriate remedy.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROSIE LEE PEGUES, et al.,

Plaintiffs,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, et al.,

Defendants.

488 F.Supp. 239 (March 7, 1980)

MEMORANDUM OF DECISION

ORMA R. SMITH, District Judge:

This action has been submitted to the court for decision after a fourteen-day trial on the merits in which all parties participated.

The court has received the memoranda of the parties and post-trial proposed findings of fact and conclusions of law. After a careful study of the evidence presented, the court has concluded for the reasons hereinafter given, that plaintiffs cannot prevail and the complaint must be dismissed.

I. The Parties

The plaintiffs, Rosie Lee Pegues, Rebecca Gillespie, Mary Boyd and Robert Williams are members of the black race. They reside in or near Bolivar County, Mississippi, and were job applicants at the Bolivar County or Cleveland, Mississippi local office (hereafter sometimes referred to as the "Cleveland MSES office", or the "Cleveland office") of the Mississippi State Employment Service (MSES). They have been permitted to prosecute a class action for the benefit of all black and female job applicants at the Cleveland MSES office who have received or may receive in the future, disparate treatment at the hands of the personnel at that office.

The defendants are:

1. The Mississippi State Employment Service (MSES), a division of the Mississippi Employment Security Commission.

2. John E. Aldridge, a resident of

Hinds County, Mississippi. Mr. Aldridge was the Executive Director of the Mississippi Employment Security Commission from July 16, 1960, until his retirement at the end of February 1978.

3. Ernest C. Lindsey, a resident of Cleveland, Bolivar County, Mississippi. Mr. Lindsey has been, and is presently, office manager of the Cleveland MSES office, serving in this capacity since November 1968.

4. The United States Secretary of Labor, currently the Honorable Ray Marshall, a resident of Washington, D.C.

5. The United States Department of Labor, represented herein by the Atlanta Georgia office of the United States Employment Service (USES).

The Federal Defendants, that is to say the Secretary of Labor, The Labor Department, and USES, have been released from the suit by prior order of the court except for their

role as defendants to the third-party complaint of MSES, and other state defendants.

II. Jurisdiction

The action is predicated on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; 42 U.S.C. §§ 1981, 1983, and the Thirteenth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is vested pursuant to 28 U.S.C. § 1343(3) and (4).

III. The Issues

The named plaintiffs contend that the Cleveland MSES office discriminated against them because of their race and sex in classifying them for employment referrals and in making referrals. Defendants Aldridge and Lindsey are said to be personally liable to plaintiffs and members of their class because they knowingly participated in the action of the Cleveland MSES office in its discriminatory conduct.

The class represented by plaintiffs is described as a class of black persons and females who have sought, or in the future may seek, employment opportunities through referrals by the Cleveland MSES office and who claim that they have been, or in the future may be, the target of discrimination on the basis of race or sex.

The State Defendants claim indemnity from the Federal Defendants for any monetary recovery for which the State Defendants are held liable on account of back pay to plaintiffs or class members, suit costs, etc., in the event of an adverse judgment in the action. The State Defendants also seek injunctive relief from the Federal Defendants should the same become appropriate.

IV. Plaintiffs' Evidence

A. The Named Plaintiffs

1. Rosie Lee Pegues did not appear or testify at the trial of the case. Her

record [SD Exhibit 58] reveals that at the time of the events upon which her Title VII charge was based, she was forty-six years of age. Her education was at the sixth grade level. The "Adult Basic Learning Examination" administered to her revealed a reading level of third grade, and math level of fourth grade. Her previous work history was in the field of farm work, maid, kitchen help, and housecleaning. She had also worked five months with the Headstart Program in Merigold, Mississippi. On her application Form 511, under "Type work preferred," she wrote she was not willing to accept a job out of the area. The 511 form reveals that she had been referred to the STAR Program [Systematic Training and Redevelopment] at Mound Bayou, Mississippi, a program designed to provide training to help remove employment barriers from persons with low educational, training, skill and experience levels. She participated

in the program, but the program was terminated for lack of funds before it was completed. There was also an entry of termination for "loss of interest" on status change notice dated December 4, 1969, in her STAR file.

2. Rebecca Gillespie, at the time of the events upon which her Title VII charge was based, was twenty-eight years of age. Her education was at the eighth grade level, with tenth grade equivalency later achieved. The "Adult Basic Learning Examination" administered to her revealed a reading level of fifth grade, and math level of fifth grade. Her previous early work history was in a factory for one year [Alabama Metal, Rosedale, Mississippi], and as a cook-helper with the Headstart Program at Pace, Mississippi. She later worked as a nurse aide. She, too, had been referred to the STAR program to assist in removing her employment barriers,

and participated in the program until it was terminated. Before enrolling in that program, she had been referred by MSES to a job at Misceramic Tile, where she was not hired, and at the Bar B Q House, where she was hired, and worked for three days. September 26, 1969, counseling insert form shows "Mainstream [MDTA] for nurse aid when slot develops." During the time when this applicant was seeking employment through the Cleveland MSES office (1968 - 1975) she completed five full term pregnancies. She testified that during parts of the relevant time period she was earning about $25.00 per day hauling farm labor with her truck.

3. Mary Boyd, at the time of the events upon which her Title VII charge was based, was forty-nine years of age. Her education was at the sixth grade level. The "Adult Basic Learning Examination" administered to her revealed a reading level of fourth grade

and math level of fourth grade. Her previous work history was in the field of farm work and housecleaning. Her type work preferred was "nurse aide training" or "cafe." She, too, had been referred to the STAR program to assist in removing her employment barriers, and participated in the program until it was terminated. In 1971 she was referred by the Cleveland MSES office to nurse aide training, and upon completion was referred to Community Hospital in Mound Bayou, where she was hired as a nurse aide.

4. Robert Williams, at the time of the events upon which his Title VII charge was based, was thirty-six years of age. His education was at the second grade level. The "Adult Basic Learning Examination" administered to him revealed a reading level of below first grade, and math level of second grade. His previous work history was tractor driving and other farm work.

He, too, had been referred to the STAR program to assist in removing his employment barriers, and participated in the program until it was terminated.

None of the named plaintiffs who testified was able to cite any referral of a white or a male who was less qualified than they, or similarly qualified, to any job which named plaintiffs believed they should have been referred to. The testimony of these plaintiffs showed that they were well aware of their employment barriers, and that they were making an effort to remove those barriers. Plaintiff Boyd testified that she had no objection to being classified or referred as a maid, and plaintiff Williams testified that janitorial type work was about all that he was capable of doing. In addition to the STAR training, defendants MSES also furnished other counseling and training opportunities to the named plaintiffs in an

effort to prepare them for entry into the Bolivar County job market at the highest level for which they might be qualified. On or about February 27, 1970, named plaintiffs filed Title VII charges against MSES, charging discriminatory service to them.

None of the plaintiffs who testified had any dealings with defendants Lindsey or Aldridge, or knew who they were.

B. Members of Plaintiff Class

Testimony was taken from some seventeen other black applicants, male and female, who were seeking employment and who sought the services of the Cleveland MSES office toward that end. These witnesses, with varying qualifications, were rendered various services by the Cleveland MSES office. There was no credible testimony from these witnesses that any white, or male, job applicant less qualified, or similarly qualified, was referred to any job which these members of the

plaintiff class believed they should have been referred to. There was evidence of referral to Baxter Laboratories, as well as to other desirable employers, and evidence of various other appropriate services rendered by the Cleveland MSES office to this group of plaintiffs. Some did not respond to MSES "call in cards", and their applications were inactivated pursuant to Employment Security Manual provisions.

One of these witnesses, Adeline Ward Brown, who complained that she was classified in a code for domestic maid was referred to a job at Baxter Laboratories a week later. The use of one classification would not prevent the referral to a job in another code, if such a suitable job became available.

Testimony on behalf of plaintiffs relating to services rendered to black and female applicants dealt with various individual complaints, and surmised that better service should have been rendered to them.

C. Plaintiffs' Statistical and Expert Evidence.

Plaintiffs, through the pretrial discovery process, were afforded a great number of documents by both state and federal defendants. They were also furnished a massive amount of factual information by way of answers given to interrogatories propounded to the defendants.

Based upon the information secured through the sources just mentioned plaintiffs prepared a detailed computer printout to summarize the information obtained so as to present the same to the court in understandable form. The printout was used as a basis for the preparation of charts and schedules by plaintiffs for presentation as evidence to the court.

From the information obtained at the pretrial stage by the parties, a stipulation was prepared and furnished the court at trial. The instrument contained a list of

approximately 109 stipulations of fact which the parties agreed would not be controverted.

Using this wealth of material, plaintiffs' analyst prepared numerous charts which were alleged to contain evidence of discrimination on the basis of race and sex by the state and federal defendants in the processing of applications for referrals and in making referrals on job orders at the Cleveland MSES office.

Based upon the charts and information of record, plaintiffs' experts opined that the named plaintiffs and members of the class had been and were being discriminated against on the basis of race and sex by defendants through the Cleveland MSES office in processing applicants for job referrals and in making referrals on job orders received from prospective employers.

For the reasons hereinafter given, the court finds that the testimony of the experts and analyst introduced by plaintiffs,

was not sufficient to support plaintiffs' burden of proof on the issues involved.

V. The Defendants' Evidence

A. Operation of the Cleveland Office of MSES

1. Service to Applicants

Ernest C. Lindsey, the manager of the Cleveland office since 1968, and a defendant in both his official and personal capacity, was called by the plaintiffs as an adverse witness. He testified at length and in considerable detail, on cross-examination and later on direct, about the operations of his office and the procedures that are used to serve the job applicants who come into that office. These procedures are for the most part performed pursuant to the Employment Security Manual, a detailed guide to the operation of the local office. The services rendered to the job applicant may be summarized as follows:

The applicant is greeted by the

receptionist, who, after initial interview, refers him to the interviewer who handles the Dictionary of Occupational Titles [DOT] job code families which appear to be of principal interest to the applicant. The applicant completes his application form [No. 511] with assistance as necessary from the interviewer. A copy of the form appears as an appendix hereto. A dialogue ensues between the applicant and the interviewer for the purpose of developing all available information that is pertinent to determining the applicant's training, skills, work experience, education, interests, preferences, availability, and aptitudes, so that a satisfactory classification or coding can be made, within the framework of the 20,000 job codes contained in the DOT, and also within the framework of the jobs that are available in the area served by the Cleveland office. The occupational code is a nine-digit designation. Other services

rendered include counseling, when an applicant is uncertain of his area of interest, or otherwise appears in need of further assistance in his job search, and referral to training in an appropriate case. The office also has available in its Career Development Unit the CETA, Comprehensive Employment and Training Act, and WIN, Work Incentive Program, services for those who are eligible for those special programs.

The basic function of the local office is to match people with jobs. The two aspects of the function are to attempt to refer the applicant to the best available job for which he is qualified, and to refer on a job order the best qualified applicant available. The Cleveland office is limited in its performance of that function by the fact that the only jobs with which it can match applicants are those contained on job orders placed with it by employers in the community.

The Cleveland office's share of the total job market is predominantly rural. Bolivar County is a small percentage thereof. [See State Defendants' Exhibit 32.] Another limitation on its performance of that function is the great imbalance between the number of job applicants and the number of job openings listed with the Cleveland office at any given time. Mr. Lindsey estimated this ratio to be about 5 to 1. Another limitation is the mandated Veterans' Preference which MSES follows in its referrals.

MSES uses only those tests which have been approved by the Department of Labor, and only in accordance with the instructions of the Department of Labor.

Testimony by Mr. Lindsey based on random examination of referrals on job orders disclosed that referrals on various jobs, including the most desirable and best paying, were made without regard to the race or sex of the applicants referred.

2. The Taking of Job Orders

The interviewer obtains from the employer who wishes to place a job order with the MSES office the necessary information to complete the job order form [No. 514]. A copy of the form appears as an appendix hereto. The form includes all pertinent information available that will assist the interviewer in filling the order, including the details of the job's requirements and the employer's education and experience requirements for the job. A DOT code is arrived at for the job. This number classification is the nine-digit code from the Dictionary of Occupational Titles referred to above, and is used in the process of matching applicants with jobs.

3. EEOC and Civil Rights Law Compliance in Bolivar County

The Cleveland office from the time of the passage and implementation of the Civil Rights Act of 1964 took steps to assure that its employees were aware of the provisions

of the Act insofar as it applied to the operations of that office. Such steps included the signing of a log by all employees that they had read and were familiar with those provisions, use of self-study packages, development and use of a practical Training Unit, regular self-appraisal study and reports, on-going emphasis at staff meetings, and periodic evaluation by the EEO officer of the Mississippi Employment Security Commission. Detailed procedures were developed for the investigation, reporting and processing of Title VII charges, and directives for the placement of posters, and other publicity, were complied with. Minority forums were held for the purpose of maintaining a good rapport with the local black community, and monthly "Opportunity News Letters" were distributed broadly in the black community of Bolivar County, keeping the community posted on the varied range of services

available at the Cleveland office. The manager regularly gives talks in the community, particularly at schools and training sites, about the Job Bank Viewers, how to use them, and the opportunities for employment that they contain.

The regular self-appraisal and evaluation report [Form AP-3] referred to above was periodically completed with positive showings, from random samplings of applications and job order referrals, of services rendered to protected minorities. [See SD Exhibits 44-45].

The Cleveland office in following the various procedures for assisting applicants in their job search did not make any distinction between applicants because of their race or their sex. A large percentage of the clientele of this office were members of the black race, and the employees of the Cleveland office performed their duties, within the limitations mentioned above, for

all applicants on the same basis--that is, treating each applicant as an individual, different from every other individual, in his training, work experience, aptitudes, education, job preferences, and availability.

From 1965 until the present, there have been 30 black employees in the Cleveland office, with job titles ranging from Farm Placement Representative to Employment Interviewer. At the present time, out of a total staff of 11 persons, 4 are black. Their job titles are Employment Interviewer II [two with this title], Employment Interviewer I and Employment Security Aide III.

With the scarcity of job openings on file in the Cleveland office, the MSES employees in that office did what they could by way of classification and referral to try to help the applicants obtain whatever suitable work might be available, without regard to the applicant's race or sex.

B. State Defendants' Witnesses

1. Testimony of Evelyn Lyon, longtime employee in the Cleveland MSES office, was to the effect that as Supervisor of the Career Development Unit in that office her primary responsibilities were to advise and counsel with those individuals who were eligible to participate in such special federal programs as CETA and WIN, and that her clients were predominantly black. She related several instances of such services rendered, which plainly showed exemplary attitude and service, without regard to race or sex of the individual client. She also testified about the counseling services rendered in the Cleveland local office, and its use as an employability development tool. She testified also as to the high rate of "positive terminations" for blacks in the CETA program.

2. John E. Aldridge, former executive

director of MSES, and a defendant in both his official and individual capacities, testified as to the administrative procedures adhered to during his tenure in office, and particularly the lines of communication and lines of authority from his office down to the local office manager's level. He testified that at all relevant times the various directives from DOL were implemented and properly disseminated to the field, and that diligent efforts were made to comply with the requirements of the Civil Rights Law of 1964, to assure that all services rendered by MESC were without regard to race or sex.

3. Reverend J.Y. Trice and Calvin Jones, both educators and leaders in the Bolivar County black community, testified as to the excellent rapport and reputation for good service enjoyed by the Cleveland MSES office in that community. They also related instances of such good service with which they

were personally familiar. They further testified as to the high black unemployment rate in Bolivar County, and the high incidence of unskilled black labor in the County, and that with the applicant-job opening ratio being what it was, they believed the Cleveland MSES office was doing the best it could to help blacks find employment.

4. There were five black job applicants who testified for the state defendants, and related the good and productive services that had been rendered for them. They were Richard Collins, Lillie Mae Edwards, Elexo Warrne, Mary Causey, and Marilyn Patton. They testified that their advice to a friend seeking work would be to consult the Cleveland MSES office for help. These witnesses were sincere and credible, and their testimony revealed what may be considered typical service rendered without regard to race or sex.

5. George Nash, a black employee in the Cleveland MSES office, presently contract writer with additional duties as employment interviewer, testified at length about his duties as well as the procedures followed in the Cleveland office in serving an applicant who comes in--from his reception at the front desk, to the final interview, and referral to a job--with reference to the applicable Employment Service Manual provisions followed. His testimony paralleled that of Ernest Lindsey in many respects. He has been with MESC for about eleven years, and previously held positions of CEP outreach worker, and employment interviewer.

6. Don Drane, presently manager of the Greenville MSES office, testified as to his earlier employment at the Cleveland office when he worked with the named plaintiffs in the CEP program. He identified certain of the CEP and STAR records pertaining to those

individuals, and testified as to the purposes behind the CEP, STAR, and related programs, and the strong efforts made by the Cleveland MSES office to help the participants or enrollees in those programs to remove their employment barriers, and obtain productive employment.

7. Louis Beverly, the MESC EEO Officer, and a black, testified concerning the duties of his office, and particularly about his observations and evaluations of the Cleveland MSES office over a period of years. He has served in this position since 1972. He reviewed several evaluation reports which he had made on that office, and related his conclusions as to the positive, ongoing efforts which have been and are being made there in service to applicants without regard to race or sex. [See S-D Exhibits 56, 57, and 80.]

8. Charles Ballard, Assistant Director, Employment Service Division, who has been with

MESC for over forty years, testified about the relationship between the Department of Labor and the MESC, and the Employment Security Manual and its directives for local office operations. His testimony further covered the period of time when he was Chief of Programs & Methods Department for MESC, when in that capacity his department supervised the administration of tests. His testimony was that the Cleveland MSES office at all times complied with DOL directives and procedures in the use of tests. He further testified that if there was ever any doubt about the appropriate use of a test, his department would always clear it with the DOL before going ahead with such use.

C. The Relationship of State and Federal Defendants

1. The Mississippi State Employment Service (MSES) is a division of the Mississippi Employment Security Commission. MSES is a State operated employment service within the

system of State and local employment services receiving Federal assistance under the Wagner-Peyser Act, 29 U.S.C. § 49-49K. MSES maintains and operates employment agencies throughout the state.

2. Under the system of "cooperative federalism" envisioned by the Wagner-Peyser Act, the Secretary of Labor makes grants to pay the administrative costs of operating State Employment Service Agencies. The various State agencies are created by the State law and are operated as agencies of State government. Through his authority as grantor of the funds for the state agencies, the Secretary of Labor exercises general supervisory authority over these State employment services. The Secretary of Labor prescribes the general policies under which the State employment service agency performs its functions. Particularly in the field of client service at the local office area,

Federal policy provides for wide flexibility and discretion to State personnel in the performance of their duties.

3. Section 602 of the Civil Rights Act directs Federal departments and agencies empowered to extend Federal financial assistance "to any program or activity, by way of grant, loan or contract" to effectuate the purpose of the Act by issuing implementing rules and regulations. The Secretary of Labor on December 4, 1964 published implementing regulations applicable to the Employment Service as well as other departmental programs in the Federal Register (at pp. 16284-16287 as Part 31 of Title 29 of the Code of Federal Regulations). Implementing instructions were also incorporated in the Employment Security Manual (ESM) Part II Sec. 1294. (FD exhibit 51).

4. The Secretary of Labor also issued to all State employment security agencies,

including MSES policies and instructions designed to forbid and avoid discrimination in referral, classification or testing and these policies and the instructions are legal and effective. These policy statements include:

(a) General Administration Letter 833, December 31, 1964, Nondiscrimination in Federally Assisted Programs of the Department of Labor - Effectuation of Title VI of the Civil Rights Act of 1964 - with attached copy of 29 C.F.R. Part 31 (FD Exhibit 7).

(b) United States Employment Service Program Letter 1919, November 9, 1965, Employment Practices under Title VII of the Civil Rights Act of 1964. This order superseded any conflicting instructions in the Employment Service Manual (ESM) with respect to implementation of Title VII of the Civil Rights Act of 1964. Its purpose was to

discontinue the noting of sex and age specifications in Job Bank Job Order listing (FD Exhibit 9).

(c) General Administration Letter 1054, February 1, 1967, Conformance with the Provisions of Title VII of the Civil Rights Act of 1964 which Prohibits Sex Discrimination in Employment and Training Programs. Its purpose was to assure full compliance with the sex discrimination provisions of Title VII of the Civil Rights Act of 1967 [sic]. (FD Exhibit 17).

(d) Training and Employment Service Program Letter 2582, October 9, 1970, Discriminatory Specifications on Job Bank Job Order Listings. Its purpose was to discontinue the noting of sex and age specifications in Job Bank Job Order listings. (FD Exhibit 11).

(e) Training and Employment

Service Program Letter, December 27, 1971, Elimination of Comments on Personal Traits and Characteristics on Application and Order forms, instructed State agencies to eliminate and delete all comments on personal traits and characteristics on Application Forms, ES-511 and Order Form, ES-514 since they can be unfairly discriminatory. (FD Exhibit 13).

(f) U.S. Employment Service Program Letter, 2698, May 17, 1966, Guidelines on Sex Discrimination Provisions of Title VII of Civil Rights Act of 1964. Disseminated additional information on the guidelines concerning the sex discrimination provisions of Title VII and attaching EEOC guidelines on sex discrimination. (FD Exhibit 15).

(g) General Administration Letter 1466, July 5, 1972, EEO Guidelines on

Discrimination Because of Sex. To inform State agencies of the New EEOC Guidelines on Discrimination Because of Sex. (FD Exhibit 19).

(h) Training and Employment Service Program Letter No. 2756, Proper Use of General Aptitude Test Battery (GATB), in Counseling and New Policy on Use of Specific Aptitude Test Battery (SATB) in Selection. To reemphasize the need for careful interpretation of GATB test results in counseling particularly when working with minority group applicants and to issue a new interim referral policy to assure that minority group applicants are not discriminated against in testing and selection for referral to jobs. (Stipulation Exhibit 56).

(i) Training and Employment Service Program Letter No. 2756, Change 1; issued a list of SATB's that may be used in

selection in accordance with standard Employment Security Manual procedures. (Stipulation Exhibit 57).

(j) General Administration Letter No. 18-79 Uniform Guidelines on Employee Selection Procedures (1978), transmitting the Guidelines and to provide information on the implementation of the Guidelines. (FD Exhibit 54).

5. State Employment Service Agencies are required to follow the policies stated in the Employment Security Manual (ESM). The purpose of the ESM is to set the minimum standards for operating the State employment services. 29 U.S.C. § 49b. These standards can be altered or expanded to fit the State's particular labor market.

The States have flexibility in running their employment services provided they do not violate Department of Labor policies or operate below the minimum standards as set

forth in the ESM or instructions. (FD Exhibit 51 unless otherwise noted.) Those policies include:

(a) The classification of an applicant in terms of the Dictionary of Occupational Titles (DOT) on the basis of an evaluation of all occupational qualifications as shown by work experience, training and personal characteristics; not to extend preference to any applicant or group, except in accordance with legal requirements and to ensure, as far as practicable, that applicants suitably qualified for job openings are referred to employers. ESM Part II, § 1005.

(b) The application process as a part of the placement process in which the interviewer reviews, analyzes and completes information on applicant qualifications, determines the need for

counseling and gives the applicant information which may increase his or her opportunities for placement. ESM Part § 1010.

(c) Work experience as a major source of an applicant's occupational qualifications. It is essential for the interviewer to consider all significant variable factors. ESM Part § 1066.

(d) Personal characteristics, including vocational interests and preference, must be considered in determining occupational qualifications in addition to information on work experience and training. ESM Part II § 1070.

(e) Interviewers explain to the applicant the various occupational codes (DOT) for which they qualify and ask them to state occupational preferences. When the applicant's preferred occupational code is not assigned, justification of the assignment should be noted

on the application card. ESM Part II § 1090.

(f) Interviewers explain the method of operation of the local office so the applicant understands the method of selection, and explains the meaning of any occupational title and skills if requested by the applicant. ESM Part II, § 1100.

(g) The interview for the assigning of occupational (DOT) classifications of applicants is a fact finding process. Occupational classification shall be assigned solely on the basis of factors bearing on job performance and no classifications shall be made on the basis of or influenced by race, creed, color or national origin. ESM Part II, § 1190.

(h) In making an occupational classification the interviewer evaluates evidence of an applicant's

qualifications, determines a specific job or jobs or fields of work to which significant evidence points and compares the skills, knowledge and the ability of the applicant with the code requirements. The interviewer discusses the possible classifications with the applicant. ESM Part II, § 1191.

(i) An interviewer should rarely consider personal characteristics alone. However, with inexperienced applicants an interviewer may be forced to consider personal characteristics such as personal status, aptitudes, personal traits and vocational interests. ESM Part II § 1198.

(j) The interviewer in consultation with the applicant develops one or more occupational codes and picks one as the primary code. Where opportunities for employment are limited the

interviewer insures that there is at least one additional classification for which there is a specific or general opportunity for work. ESM Part II § 1203.

(k) The interviewer informs the applicant of all codes assigned to him or her. In some cases, this discussion will bring to light any conflicts over the assignment of codes. ESM Part II § 1205.

(l) Job opportunities for unskilled workers may be increased by the use of summary job code groups. This technique consists of grouping related processes or functions which normally require familiarly [sic] with the industrial or occupational environment but in which specific experience requirements do not justify a full five or six digit code. The Mississippi Employment Service

Manual does not contain a similar section. ESM Part II, § 1225.

(m) Order taking is the process the interviewer uses for gathering information about the job from the employer for referral purposes. The nature of the job may be such that the interviewer may gather the necessary information about job content and worker qualifications by means of an interview with the employer. Other jobs may be sufficiently complex that information is more effectively obtained by actual observation of the job. ESM, Part II § 1250.

(n) The local office is prohibited from processing job orders that are contrary to Federal, State or local laws. ESM Part II § 1290.

(o) The local office is prohibited from processing employer job orders where there is evidence or information

that the employer discriminates by race, color or national origin. Any employer specifications that result in the exclusion of applicants of a particular race, color or national origin are discriminatory even though the employer specifications are not expressly discriminatory. Although this section does not list every conceivable form of discrimination the instructions are sufficient to put local offices on notice of the types of discrimination that may exist. ESM Part II § 1294.

(p) The selection of applicants for referral involves a 3-step process: determining performance/non-performance job requirements, accurately determining applicant qualifications and preferences, and a point by point comparison of qualifications and job requirements. ESM Part II § 1450.

(q) In selecting applicants for referral the interviewer must beware of hiring requirements which have little or no relation to work performance requirements. ESM Part II § 1461.

(r) The interviewer, in making a referral, should consider the factors influencing the applicant's acceptance of the referral. The vocational interests and substantiated interests of the applicant deserve careful consideration in deciding the appropriateness of the job referral. ESM Part II, § 1507.

(s) Since applicants rarely exactly meet all of an employer's requirements, the interviewer should discuss the applicant's qualifications with the employer in order to effect a compromise such that the employer will relax non-performance requirements in favor of otherwise acceptable applicants. ESM,

Part II § 1508.

(t) The local office cannot make referrals on orders containing discriminatory specifications with respect to race, creed, color or national origin. ESM Part II, § 1650.

(u) Employment service local offices should give necessary emphasis and attention to carry out employment service functions, including relations with minority applicants, employers and the community in such a manner as will best promote nondiscriminatory employer employment practices. ESM Part II §§ 8100-8170. (FD Exhibit 52).

(v) The objective of the employment service in providing services to women is to assure that they are given equal consideration for employment opportunities and any other needed services. Job classifications should be made to provide

maximum exposure to job openings, and special care should be taken to avoid placing her in stereotyped categories associated with women. Local offices are prohibited from processing job orders that contain unlawful sex specifications. ESM Part II §§ 8710-8739. (FD Exhibit 32.)

6. The system outlined in the ESM contemplates an objective, nondiscriminatory evaluation of an applicant's skills, abilities and preferences and a job related analysis of the employer's needs. Nonetheless the system depends on the skills, judgment and attitudes of each local office interviewer. The system allows an interviewer flexibility in matching applicants with job opportunities based upon job related factors. Neither federal nor central state authorities can exercise complete control over the one-on-one relationship at an

employment service interviewer and an applicant or an employer.

D. Statistical Expert Evidence

The State Defendants introduced an expert witness to present their statistical analysis of rate of referrals for job applicants and the average rate of salaries of those job referrals.

The Federal defendants introduced expert evidence to support the validity of tests prepared by MSES for use by the Cleveland office in making job referrals of job applicants.

VI. The Battle of the Analysts and/or Experts.

A. Plaintiffs' Analytical and Expert Evidence.

Plaintiffs' analyst prepared from the statistical evidence obtained for use at trial certain exhibits and charts.

Relying upon the premise that all available and material factual and statistical information had been obtained and

presented to plaintiffs' analyst for her consideration in preparation of exhibits and charts and the accuracy of her analysis thereof, plaintiffs' experts concluded that those in charge of the Cleveland office and responsible for the referral of job applicants on job orders were guilty of discriminating against plaintiffs and members of the class on the basis of race and sex.

Dr. James L. Outtz, an expert in Testing and Industrial Psychology, testified for plaintiffs. He based his conclusions primarily on plaintiffs' Exhibits 145, 163 and 127 and Stipulation paragraph 78.

At trial, the Federal Defendants presented a motion to dismiss the action as to the Federal Defendants. The motion was premised on the proposition that the evidence presented by plaintiffs upon which Dr. Outtz based his opinion was not sufficient to support his conclusions.

Plaintiffs' Exhibit 163 is a chart prepared by MSES showing test results on specific aptitude test batteries administered by the Cleveland office in 1971. From this data, plaintiffs developed their Exhibit 145 which arrays the same information and adds to it a calculation of the percentage of persons with scores below norm, a percentage which they characterize as the percent of people who failed the examination or test. Dr. Outtz analyzed the percentages found in the percent failed column in Exhibit 145 to reach the conclusion that there was statistical adverse impact. Dr. Outtz did not independently know which persons fell in the column headed "Number With Scores below Norm."

The record reflects that the chart included in plaintiffs' exhibit 163, was prepared by David Morris. Mr. Morris included in the figure given in the "below

norm" column those persons taking the test who scored either "M" or "L". The figures used by Dr. Outtz from plaintiffs' exhibit 163 in the "below norm" column does not identify those who failed the test. For an explanation of letter grades H, M and L, see infra.

The Federal defendants concluded that since it was possible that all or most of the people with scores below the norm received the letter grade M and could have been in the pool of people referred, calculations based upon the chart in Plaintiffs' Exhibit 163 cannot show adverse impact.

Plaintiffs' Exhibit 127 purports to show a different rate of referral for blacks or whites of persons coded in the nurse aide code who were referred to a nurses aide training program. The evidence reflected that Dr. Outtz did not know how many if any of those persons were test selected.

In the absence of such information, the Federal Defendants argue that this exhibit cannot demonstrate adverse impact in fact in terms of test selection.

Stipulation paragraph 78, contains a chart of racial differences on scoring on various aptitudes of the general aptitude test battery (GATB). Federal Defendants contend that since no evidence was presented to demonstrate any impact of any tests in the Cleveland office, the information contained in Stipulation Paragraph 78 does not prove anything.

The motion to dismiss made during the trial, was briefed by the parties on one-day notice. After having given due consideration to the matter, although impressed with the validity of the position asserted by the Federal defendants, the court elected to overrule the motion in favor of finishing the trial and deciding the action on the merits.

The Federal Defendants have filed a post-trial motion to dismiss or for summary judgment for failure to make a prima facie case of adverse impact. The motion presents the same issues included in the Federal Defendants' motion to dismiss filed during the trial. The parties have submitted additional memoranda supporting their respective views.

The action has been tried in its entirety. The court concludes that the interest of all parties will be served by treating the post-trial motion as moot.

The court received other expert evidence in support of plaintiffs' position that the evidence as a whole sustained plaintiffs' charge of discrimination on the basis of race and sex by the Cleveland office.

Plaintiffs' expert evidence also attacked the validity of the tests promulgated by the Federal Defendants for use by

MSES at its Cleveland office on three specific occupations--(1) table worker positions (S-28); (2) licensed practical nurses training programs (S-270); and (3) nurses aide training and jobs (S-282) and asserted adverse impact from use of the test on black applicants.

The discrimination in testing issue was the subject of extensive expert evidence introduced at the trial. Plaintiffs asserted invalidity of the tests and adverse impact of each upon the opportunities of members of the black race seeking employment through the facilities of the Cleveland office.

The Federal defendants defend the validity of the test through their own expert evidence and assert that proper validation procedures were taken on the test used in each of the occupations under attack.

B. The Testing Issue.

The court has tried the issues pertaining to the validation of the tests prepared by the Federal Defendants and used by MSES at its Cleveland office. From the evidence introduced, the court finds:

1. The United States Employment Service (USES) has developed the General Aptitude Test Battery (GATB) and the Specific Aptitude Test Battery (SATB) for use in the local employment service offices.

2. The GATB is composed of eight pencil and paper tests and four apparatus tests designed to measure the nine aptitudes found to be important for successful performance on various jobs. The nine aptitudes and tests are as follows:

G - Intelligence

Part 3--Three Dimensional Space
Part 4--Vocabulary
Part 6--Arithmetic Reason

V - Verbal Aptitude

Part 4--Vocabulary

N - Numerical Aptitude

Part 2--Computation
Part 6--Arthemetic [sic] Reasoning

S - Spatial Aptitude

Part 3--Three-Dimensional Space

P - Form Perception

Part 5--Tool Matching
Part 7--Form Matching

Q - Clerical Perception

Part 1--Name Comparison

K - Motor Coordination

Part 8--Marking [sic] Making

F - Finger Dexterity

Part 11-- Assemble
Part 12-- Disassemble

M - Manual Dexterity

Part 9--Place
Part 10--Turn

The GATB was developed on the

basis of a statistical analysis of 59 different kinds of tests which had been used in predicting performance in a wide variety of occupations. The nine GATB aptitudes were selected because they provide adequate measures of all the major abilities measured by the 59 tests. (Stipulation Exhibit 80, FD Exhibit 50, Testimony of John Hawk).

3. The GATB and Occupational Aptitude Patterns (OAP) are counselling devices and their use is governed respectively by § 9300 and § 4000 of Part II of the Employment Service Manual. These tools are not to override the individual's employment desires or job choices. The GATB or OAP are not at issue. (Stipulation exhibits 80 and 54, FD Exhibit 50).

4. The GATB was developed by the United States Employment Service (USES)

and has been used since 1947 by State employment services. Since that time the GATB has been involved in a continuing program of research to validate the tests in many different occupations and to insure that the tests used meet professional standards and legal requirements. The USES has consistently used the best information available, at the time, to develop high quality tools to further the basic goals of the employment service. USES research is goal-oriented so research efforts have been almost entirely in the area of applied as opposed to pure research. Wherever possible the USES has applied techniques and procedures which have been developed by others and demonstrated to have utility. (Testimony of John Hawk.)

5. The SATB is a test battery consisting of 2 or more of the GATB

aptitudes and is used as a measure of potential for success in a specific occupation.

6. Only the S-28, Table Work, S-270R Liscensed [sic] Practical Nurse and S-282 Nurse Aid tests are at issue in this case.

7. Since 1967 the majority of USES research efforts have been the investigation of the impacts of its tests on minority groups. USES research staff was doubled in 1972 for this purpose. An enormous amount of information has been gathered on USES tests and, the general finding is that USDOl tests are fair for minority groups. This also has been the finding of other investigations that have studied USES tests. (Testimony of John Hawk and Dr. John Hunter).

8. The use of the USES tests is

governed by the Employment Service Manual, Part II §§ 9000-9999 and includes the following sections:

(Stipulation exhibit 54 unless otherwise noted.)

a. It is the policy of the USES to use objective tests and related techniques as needed in the operation of employment service counseling testing and placement programs. ESM Part II, § 9001.

b. USES tests are developed to aid in the selection and referral of inexperienced, untrained and entry workers and under certain conditions for future promotion or transfer to more skilled positions. Applicants for specific occupations may be tested if the job order calls for workers with no previous experience in the job, newly recruited workers who will be provided on

the job training or newly recruited workers are to be considered to promotions to other than entry level jobs.

c. Aptitudes tests should not be used when the individual is experienced and has demonstrated proficiency in the occupation under consideration, the employers job order calls for specific work experience and aptitude test norms have not been developed for a particular occupation. There is no arbitrary or a priori choosing of tests and test scores. ESM Part II § 9157.

d. The application form of plaintiff Rebecca Gillespie indicates that she was given the nurse aid SATB although she was experienced as a nurse aid. (Stipulation Exhibit 8).

e. The interpretation of test scores is not a mechanical process. Although aptitude tests are more

accurate in determining an applicant's qualifications than any subjective means, test results are only one factor in determining an applicant's fitness for specific job opportunities. Other factors to be considered are educational, special skills, knowledge and physical capacity. ESM Part II § 9319.

f. In interpreting test results the interviewer or counselor should assume that the individual tested has at least the amount of aptitude demonstrated in the test and possible [sic] more. An applicant should not be excluded from consideration for a job or training on the basis of test results alone. If the applicant meets the other hiring specifications or training requirements, he or she may be referred for consideration together with test selected applicants. ESM Part II § 9312.

g. The USES has provided State employment services complete instructions for the administration and scoring of the SATB and are contained in the Manual for the GATB and the ESM. ESM Part II § 8395. (Stipulation exhibit 80, and 54.)

9. The SATB is scored H, M, or L. There are no absolute pass or fail scores. The letter scores are interpreted as follows:

H - Meets or exceeds all of the norms for a particular SATB. An applicant receiving H is judged to be satisfactory for the job, if also qualified on the basis of factors other than aptitude and may be referred.

M - The obtained score plus one standard error of measure meets or exceeds all the norms for a particular SATB. M scores are close to

those workers judged to be satisfactory and may be referred.

L - The obtained score plus one standard error of measure are below the requirements for "M". The chances of an applicant being satisfactory on the job are low. The applicant should be considered for other jobs which utilize stronger aptitudes. An applicant may be referred although if warranted by (1) factors other than aptitudes i.e., interests, training, experience, or motivation (2) local labor conditions requiring more than available H & M applicants (3) the employer has agreed to accept less competitive applicants as a result of job development. ESM Part II § 9312. (Stipulation exhibit 54, Testimony of John Hawk.)

10. USES deliberately set its cutting scores to "pass" at least 2/3 of those tested. Thus, instead of rejecting the vast majority of applicants, USES procedures insure that these applicants are given further consideration.

11. The "cut off" score for USES tests is set at a 2/3 - 1/3 level because USES experience over the years has been that 1/3 of employed workers are unsatisfactory; hence the 2/3 - 1/3 division was used in both the test scores and in the research sample. On any given job there is a range of performance from outstanding to very poor. What is acceptable performance is influenced by a host of factors including the perceived probability of hiring someone better than the worker in question. (Testimony of John Hawk and Dr. John Hunter.)

12. All applicants classified as "failing" in plaintiffs exhibits 145 and

163 are, according to testimony and USDOL policy, eligible for referrals. A proportion of those "failing" actually scored "M" and received very nearly the same consideration as those "passing". (Stipulation exhibit 54, testimony of David Morris and John Hawk).

13. Racial bias on the part of raters has not been demonstrated to exist in either the specific USES research at issue or as a general case. The validities of the tests for blacks and whites are of similar (positive) magnitude and at a useful level. Plaintiffs have alleged that the validities of the test for the total research sample may be caused by racial bias on the part of the raters assessing job performance and different levels of performance of the test by racial group. This has not been demonstrated.

14. In its research the USES uses a variety of different criterion measures

including supervisory ratings. The raters used for USES research were supervisors and had already spent a great deal of time in evaluating the performance of workers which is a significant job duty for supervisors. They are usually trained in performance evaluation by the employer. Raters are provided individual orientation, training and assistance when the ratings are obtained. Any question of rater bias is reported and data obtained from such a rater is not used. Plaintiffs have alleged that rater bias could have been reduced by training the raters. The record shows this is not the case. (Testimony of Herbert Campbell, John Hawk and Dr. John Hunter.)

15. Research has shown that ratings on specific behavior are not superior to the type of ratings used by USES. Plaintiffs allegation that specific rating scales would reduce rater bias is without foundation.

(Testimony of Dr. John Hunter.)

16. Empirical research has demonstrated that validity is not perceptably changed by differences in location, differences in specific job duties or applicant populations. Valid tests do not become invalid when these circumstances change. Plaintiffs' allegation that validity is specific to a particular location, a particular set of tasks and to a specific applicant population, or in other words, that a valid test in one set of circumstances is not valid in circumstances not perfectly identical is not true. (Testimony of Dr. John Hunter.)[1]

17. No evidence was presented that USES ratings were based on irrelevant job

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1. The research done by Dr. John Hunter and his colleagues shows that the validity of tests is broadly generalizeable across jobs, geographical locations and applicant populations. In both the 1970 EEOC Guidelines and the Standards of the American Psychological Association such research has been called for.

duties or were not related to measuring job performance. The ratings used by USES were based on quality, quantity and accuracy of work, job knowledge and versitility [sic], which are central and essential aspects of job performance. Plaintiffs allegation that the validities found in research were spurious because the ratings may have been based on irrelevant job duties or were not "meaningful" is not true. (Stipulation exhibits 68, 69, 73, and Testimony of John Hawk.)

18. It is well known within the industrial psychological profession that restriction in range of the research sample produces an underestimation of the relationship found in the incumbent population from which the sample is drawn. Thus plaintiffs' allegation that the validity coefficients obtained were spurious because of restriction in the range of abilities in the research sample is without merit. (Testimony of Dr. John Hunter.)

19. Test fairness is evaluated in a number of ways. The USES tests used are fair. Thus plaintiffs' allegation that the wrong model of test fairness was used is without merit. (Testimony of Dr. John Hunter.)

20. It was demonstrated using well established techniques and conservative estimates that the reported validity of USES tests are underestimates of the validity which actually exists when the tests are used with applicants. It was also demonstrated that a very considerable dollar value is associated with the reported levels of validity. There is no truth to plaintiffs' allegation that the levels of reported validities are so low as to be of no practical value. (FD exhibit 60, Testimony of Dr. John Hunter.)

21. No differences between the job duties in the research sample and the jobs in Bolivar County were specified.

According to research, even gross changes in job duties did not destroy validity. It follows that small and/or hypothesized differences have little or no effect on validity. Plaintiffs have not shown that the USES tests were invalid because the tasks of the jobs in the research setting may have been different from those in Bolivar County. (Testimony of Dr. John Hunter.)

22. USES' goal is to establish the best test battery possible, using the best available data, evaluated according to commonly accepted techniques. Batteries and cutting scores may vary from research sample to research sample because certain tests are "highly correlated", that is, measure similar aptitudes, and because cutting scores as well as the selection of individual tests for inclusion in a battery are developed to be the most fair to all subsamples. Thus, an individual test with a high validity

coefficient may not be used in a final battery if another test produces better results for a minority subsample. Revisions of aptitudes and cutting scores are made when research demonstrates that a different battery is valid on the research sample and can be cross-validated on previous samples. Plaintiffs' hypothesis that this demonstrates invalidity is simply without merit. (Testimony of John Hawk and Dr. John Hunter.)

23. The EEOC Guidelines on Employee Selection Procedures in effect at the time of the alleged discrimination are controlling.

24. The United States Employment Service (USES) tests meet all of the applicable EEOC guidelines for test usage and validation.

(a) Section 1607.1(b) has been met. Section 9012 of the Employment Security Manual (ESM) prohibits the use of test scores as the sole basis for making an employment decision. The USES never

uses tests without evidence of validity, ESM §§ 9103 B, 9157(A)(6).

(b) Section 1607.3(a) has been met. The USES tests have been validated and evidence a high degree of utility. (SATB technical reports for S-28, Table Worker, S-282 Nurse Aide, and S-27 Licensed Practical Nurse, testimony of John Hawk and Dr. John Hunter.)

(c) Section 1607.3(b) has been met. USES policy precludes the use of tests developed by others. ESM § 9001 B.

(d) Section 1607.4(a) has been met. The USES technical reports contain evidence of validity for the S-28, S-282 and S-270R tests. (Stipulation Exhibits 73, 69, 68.)

(e) Section 1607.4(c) has been met. The technical reports contain empirical data demonstrating that the test is correlated with important job elements.

State agencies are required to have on hand, as evidence of validation, copies of the technical reports for test batteries used in selection ESM Part II, § 9160 (Stipulation Exhibit 54.)

(f) Section 1607.4(c)(1) has been met. Differences in location, jobs and applicant characteristics do not alter the proper interpretation of validity evidence. Further, no credible evidence exists that differences between units, jobs and applicant populations alter test validity. (Testimony of Dr. John Hunter.)

(g) Section 1607.5(b)(1) has been met. No evidence was presented that any of the samples are atypical or unrepresentative. Differences in applicant characteristics do not moderate or change validity. (Testimony of Dr. John Hunter.)

(h) Section 1607.5(b)(2) has been met. USES tests are administered and scored under controlled and standardized conditions. (Manual for the GATB, Sections II Stipulation exhibit 80.)

(i) Section 1607.5(b)(3) has been met. The SATB technical reports fully describe the criteria used in evaluating worker behavior. In the case of rating techniques the appraisal forms and instructions to the raters are included. (Stipulation Exhibits 66-79.)

(j) Section 1607.5(b)(4) has been met. The supervisory rating scale used by USES has been carefully developed. The ratings are carefully evaluated for any evidence of bias. Any ratings where there is even a slight chance of bias are excluded from the study. (Testimony of John Hawk and of Herbert Campbell).

(k) Section 1607.5(b)(5) has been met. The USES has conducted differential validity research. The USES has assessed the validity of its tests and the tests are shown to have positive correlations between criteria and test scores that are statistically significant for minority subsamples. In addition to the statistical significance the USES tests have practical significance and a high degree of utility. (Testimony of Herbert Campbell and Dr. John Hunter.)

(l) Section 1607.6 has been met. The SATB technical reports include graphic and statistical representations of the relationship between the test and the criteria. The average scores for all tests and criteria is reported for all subgroups. Cut off scores were set much lower for these

tests than usual. The reason for this is to allow a greater number of test-takers to pass. (Testimony of John Hawk.)

(m) Section 1607.7 is not applicable since the Department of Labor uses only validation studies it has performed. ESM § 9159 (Stipulation exhibit 54).

(n) Section 1607.8 has been met. There is no assumption of validity of USES tests. The tests are validated in accordance with these guidelines and the American Psychological Association standards. ESM Part § 9160 A. (Stipulation exhibit 54.)

(o) Section 1607.9 has been met. All the SATB's used are supported by empirical research which provides substantial evidence of validity. All of the SATB's in this case have been or are in the process of being revalidated

with substantial minority subsamples. (Testimony of John Hawk, Stipulation exhibits 66-79.)

(p) Section 1607.10 has been met. USES aptitude tests are to be used for referral purposes only for occupations for which the tests have been validated. Only USES test [sic] are to be used by local employment service offices for referrals. ESM Part § 9160, 9150 (Stipulation exhibit 54.)

(q) Section 1607.11 is not applicable since there is no evidence of disparate treatment with respect to testing.

(r) Section 1607.12 has been met. Where conditions exist that may have affected test score applicants shall be retested as soon as practical with an alternate form of a proficiency or aptitude test. ESM Part II 9015 (Stipulation exhibit 54.)

VIII. Conclusion

This is not an ordinary racial and sexual discrimination in employment action. Plaintiffs charge defendants with the operation of the Cleveland office of MSES in such manner as to discriminate against them and the class members in employment opportunities on the basis of race and sex.

The court holds, based upon the evidence introduced at trial, that those in charge of the Cleveland office, including defendants Aldridge, Lindsey and the United States Department of Labor, have demonstrated to the satisfaction of the court a concern for plaintiffs and members of their class, and have used all reasonable diligence to afford them with equal opportunities in employment.

Plaintiffs' statistical evidence did not and could not take into account the human elements involved in affording a job applicant an opportunity of gainful employment. These

elements cannot be inserted into a computer in such manner as to play a part in affording a printout which reveals a true statistical analysis of the problem. The evidence also reflects that all of the relevant and available information was not reflected in the charts and schedules presented for use in the presentation of plaintiffs' case.

This court tried the Payne case (Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248 [N.D. Miss., 1976] aff'd in part, rev'd in part on other grounds, 565 F.2d 895 [5th Cir. 1978]), which pertained to employment practices at the Cleveland plant of Travenol Laboratories, Inc. One of the issues in Payne was the use by Travenol of a tenth grade or its GED equivalency educational requirement for all operative jobs in the plant. From February 1965 until the fall of 1971, the Cleveland office processed job orders from Travenol. These orders required that

the job applicant possess a tenth grade education or its GED equivilency [sic]. The Cleveland MSES office declined to refer an applicant to Travenol who did not meet the educational requirement.

In Travenol the court held that the said educational requirement was not shown to be job-related and a result of its application was to discriminate against black job applicants. Payne v. Travenol, supra, at pages 257, et seq.

The evidence before the court in the action sub judice shows that in 1970 or 1971, the Cleveland office discontinued the acceptance of job-orders from Travenol which contained the Tenth Grade of [sic] its GED Equivilency [sic] requirement.

The practice of the acceptance of job-orders from Travenol prior to 1971 containing the educational requirement aforesaid, served to discriminate against black

applicants. This practice was discontinued, however, before the filing of the complaint herein. The court finds that any misuse of the Travenol job-orders, prior to the institution of this action, does not support any relief herein for plaintiffs or members of their class.

When the evidence is considered as a whole, the court has concluded that plaintiffs have not shown by a preponderance of the evidence that they and the members of the class represented by them, have suffered, or are likely to suffer discrimination on the basis of race or sex at the hands of defendants or any of them.

On the issues involving the Federal Defendants, the court finds:

1. There is no evidence that the SATBs were used in any manner that adversely impacted on blacks or women. The plaintiffs failed to make a showing of adverse impact

of the SATB on minority groups.

2. Not all selection procedures are unlawful. The Supreme Court recognized this in Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) where it said "[N]othing in the Act precludes the use of testing or measuring procedures; obviously they are useful."

3. The procedures for validation and standards for use of USES tests conform to the Standards for Educational and Psychological Tests and Manuals issued by the American Psychological Association, and the Guidelines on Employee Selection Procedures published by the Equal Employment Opportunity Commission (EEOC) on August 1, 1970, in the Federal Register (Volume 35, No. 149), the test validation guidelines in effect at the time of the alleged discrimination.

4. Tests may be validated by properly conducted empirical research. In many cases tests have been held invalid when they have

not been empirically validated or when a validation study was an ad hoc, after the fact, attempt to validate a testing program already in use. See, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); U.S. v. Georgia Power, 474 F.2d 906 (CA 5, 1973). It was shown by testimony and documentary evidence that the USES has had since 1947 an extensive and ongoing research program of test develo-ment [sic] validation.

5. The SATB's used by the Cleveland local office were properly validated and did not unlawfully discriminate against minorities. Jackson v. Nassau County Civil Service Com-mission, 424 F.Supp. 1162 (E.D.N.Y., 1976); Friend v. Leidinger 588 F.2d 61 (4th Cir. 1978).

The court, having found that plaintiffs are not entitled to any relief against any defendant herein, directs the clerk to enter final judgment on the complaint, as amended, in favor of all defendants, and final

judgment on the third-party complaint in favor of the third-party defendants. The defendants and third-party defendants shall recover their costs as provided by law.

This 7th day of March, 1980

/s/ Orma R. Smith
UNITED STATES DISTRICT JUDGE

SERVICES RENDERED AND/OR ACTIONS TAKEN										
DATE										
METHOD										
Called		Referred		I.D.	Closed	Form No. & Initials	ACTION TAKEN - EMPLOYER & JOB TITLE	Referral	REMARKS	Init.

DO NOT WRITE BELOW THIS LINE

1. Last Name | First | Middle Initial

2. No. and Street Address, Route or P. O. Box No. | 3. Telephone Number

4. City | State | 5. Zip Code

6. Give Directions to Your Home

7. Social Security Number | 9. Sum. Youth | 10. Sex | 11. Date of Birth (Mo. Day Yr.) | 12. Gross | 13. Mo. Exp.

14. School Last Attended

Name | Location | Year | Degree

15. Current Military Status

Type of Discharge

Period of Service From _____ To _____

16. Family Information
☐ Married ☐ Separated
☐ Single No. Dependents _____
☐ Widowed No. Keeping
☐ Divorced Child Care _____

17. Ht. ___ ft. ___ in. | 18. Wt. ___ pounds | 19. Union Status
Name _____
Local No. _____

20. Transportation
Do you have – Auto? _____ Drivers License? _____ Regular ☐ Commercial ☐

21. Type of Work Preferred

22. List Other Types of Work You Will Accept

23. Occupational Title | Code

24. Location & Salary Minimum
☐ Local $ _____ ☐ Min. $ _____
Other _____

25. Employer(s)

26. Co. | 27. R/E | 28. WFS | 29. Hyer | 30. Vet | 31. M.V. A.O.P. | Init. Date

32. Disad. | 33. Age | 34. I.S. | 35. VPW Vet | 36. Empl. Status | 37. Clrnt.

38. CETA | 39. Term | 40. ED | 41. U.S. Citizen | 42. | 43.

44. Skills, Knowledges and Abilities

45. Comments on Applicability

MSES 511 (R-10/78) APPLICATION CARD

APPENDIX A

JOB ORDER FORM

1-7 Order No.	8-16 DOT Code	17-18-19-20-41 CC / TC — Employer or Occupational Job Title
0585501		02 / 2

17-18-19-20-29 CC / TC — Employer Name	42-61 Whom to See
01 / 2	

30-59 Employer Street Address	62-71 Telephone No.	Ordered By	Order Time

60-69 City	70-71 State	72-76 Zip Code	77-79 Cnty.	80	72-79 Federal Use	80
				4		4

17-18-19-20-25 CC / TC	26-29 Order Date	30-33 Loc. Off. No.	Sta./Dist.	34-35-36-39 Cat.Cl'r'l	SIC Code	40 O.S.	41-43 Salary Verif.	44-46 Open.	47 Source	48-50 Refer.	51 Duration
03 / 2	Mo. Day Yr.								1. J.O. 2. Mandy. 3. J.O. & Mandy.		1. 1-3 days 2. 4-150 days 3. Over 150 days

52-58 Pay — Dollars / Cents	59 Pay Unit	60-61 Hrs. Worked Per Week	62-63 Exp. (Yrs.)	64-65 Educ. (Yrs.)	66-67 Min. Age (Yrs.)	68 Typing Tst.	69-71 Physical Demand	72-74 Work Cond.	75-79 State Use	80
	1. Hour 4. Month 2. Day 5. Year 3. Week 6. Other					1. Emplr. 2. S. S. 3. Other				4

JOB SUMMARY: ENTER HOURS/SHIFT/DAYS/HOW TO REACH/REMARKS AND SPECIAL INFORMATION

17-18-19-20- Card 4 — CC / TC	80
04 / 2	4

17-18-19-20- Card 5 — CC / TC	80
05 / 2	4

17-18-19-20- Card 6 — CC / TC	80
06 / 2	4

17-18-19-20- Card 7 — CC / TC	80
07 / 2	4

17-18-19-20- Card 8 — CC / TC	80
08 / 2	4

17-18-19-20- Card 9 — CC / TC	80
09 / 2	4

ASES 514 (R 7/75)

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROSIE LEE PEGUES, et al.,

Plaintiffs,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, et al.,

Defendants.

(March 7, 1980)

ORMA R. SMITH, District Judge:

FINAL JUDGMENT

This action came on for trial before the Court, Honorable Orma R. Smith, District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered, it is

Ordered and Adjudged

That the named plaintiffs and the members of the class represented by them herein, take nothing of the defendants, Mississippi State Employment Service, John E. Aldridge, Ernest C. Lindsey and the United States

Secretary of Labor, that the action be dismissed on the merits, and that the said defendants shall recover of the named plaintiffs their costs of action.

It is further ordered and adjudged that the third-party plaintiffs, Mississippi State Employment Service, John E. Aldridge and Ernest C. Lindsey, take nothing by the third-party complaint from the third-party defendant, The United States Department of Labor, and that each side shall bear its own costs.

Dated at Clarksdale, Mississippi, this the 7th day of March, 1980.

NORMAN L. GILLESPIE, Clerk

By: /s/ Margaret E. King
Margaret E. King, Deputy Clerk

Office-Supreme Court, U.S.
FILED
SEP 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROSIE LEE PEGUES, *et al.*,
Petitioners,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court follow established principles of treatment and analysis of plaintiffs' statistics?

2. Is it incumbent upon the state employment service local office to conduct an extensive, technical investigation of each requirement stated by an employer on its job order?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-139

ROSIE LEE PEGUES, *et al.*,

Petitioners,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. PREFACE

Petitioners, Rosie Lee Pegues, *et al.*, pray that a Writ of Certiorari issue to review the denial of their petition for rehearing and suggestion for rehearing en banc from the opinion rendered by the Fifth Circuit Court of Appeals on March 11, 1983.

II. OPINION BELOW

The opinion of the District Court Judge dismissing this case on the merits, March 7, 1980, is reported as *Rosie Lee Pegues, et al.* v. *Mississippi State Employment Service*, 488 F. Supp. 239 (N.D. Miss., 1980).

The opinion of the Fifth Circuit Court of Appeals, March 11, 1983, which affirmed in part, reversed in part, and remanded for entry of a decree of liability and the fashioning of an appropriate remedy, is reported as *Rosie Lee Pegues, et al.* v. *Mississippi State Employment Service, et al.*, 699 F.2d 760 (5th Cir. 1983). The panel consisted of Wisdom, Politz, and Tate, Circuit Judges.

III. JURISDICTION

Petitioners have adequately identified and set forth the jurisdictional requisites for this Court.

IV. STATUTORY PROVISIONS

Petitioners have adequately identified and set forth the statutory basis for the suit.

V. STATEMENT OF THE CASE

The basic function of respondent Mississippi State Employment Service (MSES) is to serve as a labor exchange, that is to take job orders from employers and job applications from people seeking work, and then try to match the individual with a job for which that person is best qualified.[1]

From events occurring in 1969 in rural Bolivar County, Mississippi, plaintiffs brought suit against the Mississippi State Employment Service, John E. Aldridge, a former Executive Director, and Ernest C. Lindsey, a MSES Office Manager in Cleveland, Mississippi. The United States Secretary of Labor was later joined as a necessary party.

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[1] The Dictionary of Occupational Titles (an exhaustive Department of Labor compilation) at that time actually contained some 20,000 job descriptions, with a six-digit coding system.

Plaintiffs contended that the defendants discriminated against them on the basis of race and sex, individually and classwide, in taking their job applications and in making referrals, thus violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e et seq., 42 U.S.C. Section 1981 and 1983, and the thirteenth and fourteenth amendments to the Constitution. After a three week bench trial[2] of considerable complexity in July, 1979, the Court found that the plaintiffs were not entitled to any relief against any of the defendants and entered a final judgment in favor of all the defendants.

An appeal was taken to the Fifth Circuit Court of Appeals. That Court determined that the probative evidence showed that only one of the named plaintiffs proved an individual claim of disparate treatment, occurring in July, 1971, and plaintiffs succeeded in establishing a pattern and practice of race and sex-based disparate treatment for a limited period in 1969-70. Otherwise, the Court affirmed the decision of the Trial Court. The Petition for Writ of Certiorari was then filed herein.

VI. REASONS FOR DENYING THE WRIT

A comparison with the appropriate cross-section of the relevant labor market is the proper measure by which to determine disparity in Title VII cases. At pages 8, 18, 24-31 of the petition it is alleged that a "comparison with the appropriate cross-section of the relevant labor market" is a novel or new legal standard "well-nigh impossible to meet."

This assertion does not bear scrutiny. In *Hazlewood School District* v. *United States*, 433 U.S. 299, 97 S.Ct.

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[2] Resulting in over 3,000 pages of testimony, and 200 plus exhibits, totaling many thousand pages.

2736, 53 L.Ed.2d 768 (1977), this Court again considered the use of statistical proof in Title VII cases and gave instructive discussion on the determination of what is the "relevant labor market" when it is a factor and its necessity for credible and probative statistical proof, stating:

> "[A] proper comparison was between the racial composition of Hazlewood's teaching staff and the racial composition of the qualified public school teacher population in the *relevant labor market.*" 433 U.S. at 308.[3] (Emphasis added)

The requisite comparison of the qualifications of individuals and/or class members for a job is not novel for the order and allocation of proof in a Title VII case. The leading case of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), emphasized that the complainant in a Title VII suit must carry the initial burden of establishing a prima facie case of racial discrimination by showing the individual belongs to a protected group and was qualified for the job opening and was rejected, despite his qualifications, and the position remained open for persons of complainant's qualifications.[4]

"A comparison with the appropriate cross-section of the relevant labor market" and/or comparison in individual civil rights actions to establish the initial burden to make a prima facie case of discrimination has been a bedrock principle of Title VII jurisprudence. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *New York Transit Authority* v. *Beaz-*

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[3] And see also 433 U.S. at 308 note 13.

[4] 411 U.S. at 802.

er, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798, (5th Cir.), reh'g den. 683 F.2d 417 (5th Cir.), cert. den. ___ U.S. ___ 103 S.Ct. 452, 74 L.Ed.2d 605 (1982); and *Wilkins* v. *University of Houston*, 654 F.2d 388 (5th Cir. 1981), vacated and remanded ___ U.S. ___ 103 S.Ct. 34, 74 L.Ed.2d 47 (1982), aff'd on remand, 695 F.2d 134 (5th Cir. 1983).

These authorities, and others,[5] were correctly interpreted and applied to this case by the appellate court, as a study of its opinion will reveal. They include continued admonishments as to the correct and incorrect way to treat statistics.

Petitioners' argument that the Fifth Circuit has crafted a "novel" and "new legal standard" is not valid. The findings, and conclusions made by the Court below reflect a thorough study of the voluminous record by that Court before its decision was made. The Court determined *inter alia* that petitioners failed to offer testimony, lay or expert, to explain the significance of the offered charts and data. They failed to collate it, or place it within minimal frame work for analysis. No valid conclusions could be drawn from it.

Plaintiffs below failed to meet their burden of proof. There was more than merely "evidence of some weaknes-

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[5] Including: *Pouncy* v. *Prudential Insurance Co. of America*, 668 F.2d 795 (5th Cir. 1982); *Wheeler* v. *City of Columbus, Mississippi*, 688 F.2d 1144 (5th Cir. 1982); *Williams* v. *New Orleans Steamship Assn.*, 673 F.2d 742 (5th Cir.), reh'g den. 688 F.2d 412 (5th Cir. 1982); *Rivera* v. *City of Witchita Falls*, 665 F.2d 531 (5th Cir. 1982); *Vuyanich* v. *Republic Nat'l Bank of Dallas*, 505 F.Supp. 224 (N.D. Texas, 1980).

ses in the statistics."[6] The Court did not allow "mere armchair speculations of the defendants" to improperly "cause the rejection of plaintiffs' statistics and to relieve the defendants from a shifting of the burdens of production and persuasion" Petition at ii. The Court simply found in one instance after the other, that because of fundamental errors or omissions in the various sets of statistics and comparisons offered by petitioners below, the proof was not sufficient.[7]

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[6] *Grant* v. *Bethlehem Steel Corp.*, 635 F.2d 1007, 1015 (2nd Cir. 1980), *cert. den.*, 452 U.S. 940, 69 L.Ed.2d 954 (1981).

[7] Some of these were: "presented quantitative evidence of . . . disproportionate classification . . . during selected years . . . No testimony, lay or expert, was offered to explain the significance of this data, nor was an appropriate test . . . applied" App. p. 23a "These exhibits (charts on classification) reflect imbalances, but do not show that race or sex, rather than work preferences, experience, education, and the state of the job market caused the imbalances . . . of little probative value" App. p. 25a; "There was no analysis of this data and no quantification of the white women in the pool who received more desirable codes . . . do not show job preferences for 1972, 1974, and 1976, an omission which detracts from the weight of the figures and militates against any meaningful comparison of the races" App. p. 26a; "Past experience, work preference, and the availability of alternate jobs at the time of interviewing, information which is contained in the record, were not compiled or considered by the plaintiffs. Nor were the figures subjected to statistical analysis" App. p. 27a; "such critical variables as experience, work preference, and jobs available at the time each applicant was interviewed were not incorporated in the data, nor was statistical methodology utilized to discount the possibility that apparent racial discrepancies were not due to random selection" App. pp. 27a, 28a; (Referring to exhibits on assignment to service and farm codes by race): "Occupational preferences and job availability were again omitted. Work histories . . . were widely divergent. No statistical test of signficance was used to evaluate these disparities." App. p. 28a; and (on charts of raw data on education, work preference, experience and code assignments by

It properly concluded that "it is not for the court, trial or appellate, to search the voluminous record* for data omitted from plaintiffs' comparative analysis, compensate for the failure to filter out the combined effects of factors unrelated to race or sex, choose the appropriate statistical methodology, and insert therein select parts of the array of figures presented. See *Miller* v. *Weber*, 577

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race): "Plaintiffs produced no evidence which explained or collated this data for purposes of comparison between favored and disfavored groups. The particular variant or variants to be compared among such groups was not disclosed . . . no indication of the size of the total applicant pool and the proportion thereof of each group. None of the recognized tests of statistical significance was performed in an attempt to demonstrate the unlikelihood that differential coding could be ascribed to chance rather than race or gender. Reasoned assessment of disparities in classification of blacks and females evinced in these exhibits thus cannot be made." App. pp. 28a, 29a; (on calculations on clerical and sales codes) ". . . underlying data . . . so seriously flawed as to negate plaintiffs' suggestions of statistical significance . . . not persuasive . . . all fail to incorporate the primary factor influencing referral—experience. There is no basis in the record for discounting the obvious significance of this factor . . ." App. pp. 39a, 40a; "Albeit impressive, Dr. Mann's computations do not take into account the relative qualifications of persons referred during the relevant period . . . (his) model is grounded on the unfounded assumption that all persons were qualified for referral to higher paid jobs . . . Because the raw data are deficient for failing to recognize that 'a number of factors operate simultaneously to influence the amount of salary' associated with a particular referral, (citing *Wilkins*) the findings of statistically significant disparities derived therefrom will not permit an inference of discrimination." App. pp. 41a, 42a And again, "These data tell us nothing of the relative qualifications of blacks and whites in the available applicant pools, or of the requirements imposed by the employers to whom referrals were made. Factors other than race may explain the variations in referral rates observed. To conclude otherwise would necessitate an impermissible degree of speculation." App. p. 43a.

*See note 2, supra.

F.2d 75 (8th Cir. 1978). See generally *Wilkins* v. *University of Houston*." App. pp. 30a, 31a.

There was no "immunization" of respondents' actions from judicial scrutiny resulting from the Court's decision. The Court reviewed the actions of the local employment service office in the only correct way—that is by properly considering the function of that office in its "labor exchange" capacity. The Court properly rejected petitioners' argument that it was incumbent on such local office to conduct an extensive, technical investigation of each requirement stated by an employer on its job order. If such a requirement was in place, the state employment service would conduct its operations based on the assumption that employers placing job orders are (1) presumed to be illegally discriminating when stating job qualifications, or (2) are not as well informed as to the appropriate qualifications for their jobs as are the personnel in respondents' local office processing and attempting to fill those orders. Such a posture is wholly unrealistic and would soon lead to reduced use of the job service generally, with consequent reduction of the availability of a mutually amicable and relatively speedy labor exchange for applicants and employers. Petitioners would require the employment service to perform a police[9] function which is contrary to the spirit of the Wagner-Peyser Act, its implementing state law[10] and applicable regulations. That is to say nothing of the time and manpower that would be required to attempt the kind of technical investigation apparently urged. As a practical matter, how would the "correct" level of any qualification be determined? The delays that would be entailed in such in-

[9] I.e. "use its power to demand evidence of the job relatedness of such requirements." Petition at i.

[10] Sections 71-5-1 et seq., Mississippi Code of 1972.

vestigations could only be detrimental eventually to the system and all participants in it.

Other reasons why the writ should be denied follow. The Court was dealing with a set of facts that were unique in time and place, not likely to occur again.[11] The Mississippi Delta in the mid to late 1960's, and subsequent years, was receiving the effects of widespread farm mechanization, one of which was heavy unemployment of unskilled black laborers.[12] As the record amply develops, there were few "good" jobs and a glut of job applicants. The trial judge, Judge Orma Smith, recognized this, as well as the constructive part that the state employment service office in Bolivar County was playing in trying to match the applicants with the jobs that were available. He recognized the dual duty of the employment service to applicants and employers.

Petitioners' view of this case is a simplistic one, overlooking that dual duty of respondent, and, as the Circuit Court pointed out, also overlooking such vital ingredients in their statistical analysis as relative qualifications of applicants, etc. See footnote 7, *supra*.

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[11] The Circuit Court took note of the fact that the disparities between the races and sexes have steadily narrowed over the years. App. p. 48a.

[12] The EEOC charge which began this litigation was filed in 1970.

VII. CONCLUSION

The decision of the Court below was accurate and correct, and well in line with pertinent authority of this Court. For the reasons cited, the writ should be denied.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROSIE LEE PEGUES, et al.,

Plaintiffs-Appellants,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, et al.,

Defendants-Appellees.

No. 80-3212

(April 29, 1983)

Appeal from the United States District Court for the Northern District of Mississippi

On Petition for Rehearing and Suggestion for Rehearing En Banc

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule

16) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT: HENRY A. POLITZ,
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROSIE LEE PEGUES, et al.,

Plaintiffs-Appellants,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE et al.,

Defendants-Appellees.

No. 80-3212

699 F.2d 760 (March 11, 1983)

Appeal from the United States District Court for the Northern District of Mississippi

Before WISDOM, POLITZ and TATE, Circuit Judges.

POLITZ, Circuit Judge:

Rosie Lee Pegues, Rebecca Gillespie, Mary Boyd and Robert Williams, residents of Bolivar County, Mississippi, brought suit against the Mississippi State Employment Service (MSES), John E. Aldridge, Ernest C. Lindsey, the United States Secretary of Labor, the United States Department of Labor and its division, the United States Employment

Service (USES), contending that the defendants engaged in individual and classwide discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. 42 U.S.C. §§ 1981 and 1983 and the thirteenth and fourteenth amendments to the Constitution.[1] The named plaintiffs represent a class of black and female applicants who have sought or who may hereafter seek job referrals from MSES's Bolivar County office located in Cleveland, Mississippi. After an extended bench trial, the court entered judgments dismissing both the individual and class action Title VII claims. Pegues v. Mississippi State Employment Serv., 488 F.Supp. 239 (N.D.Miss.

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1. Claims for alternative remedies for employment discrimination under 42 U.S.C. §§ 1981, 1983, and the constitutional amendments will be considered only if violations can be established on grounds different from those asserted under Title VII. Plaintiffs cite no such distinctions. We thus address only the Title VII claims. See Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir., 1982).

1980). Plaintiffs raise a plethora of issues on appeal, assigning errors of fact and law to the final judgment and two intermediate rulings. We affirm in part, reverse in part, render and remand for the fashioning of an appropriate remedy.

Procedural History

Following receipt of the requisite right-to-sue letters from the Equal Employment Opportunity Commission in January 1972, plaintiffs filed suit against the state defendants charging the MSES Cleveland office with discrimination in the classification, referral, and testing of black and female applicants for employment referral within the Bolivar County labor market. Plaintiffs charged racial and sexual discrimination in: (1) the assignment of occupational classifications to blacks and females; (2) the acceptance and servicing of certain employer job orders; (3) the administration of employment tests to

blacks; (4) the failure to refer blacks and females to available jobs; and (5) the referral of blacks and females to lower paying and less desirable jobs.

The federal defendants were joined as indispensable parties under Fed.R.Civ.P. 19(a). 57 F.R.D. 102 (N.D.Miss.1972). An amended complaint filed thereafter alleged a statewide class, and attacked regulations and guidelines promulgated by the Secretary of Labor which purportedly allowed MSES to discriminatorily classify and refer applicants, and allegedly required MSES to use employment tests developed by USES which disproportionately impacted against blacks.[2] The

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2. Plaintiffs' Title VII claims against the state and federal defendants rest on Section 703(b) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(b). This provision prohibits an employment agency, as defined in Section 701(c), 42 U.S.C. § 2000e(c), from failing or refusing to "refer for employment, or to otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."

state defendants cross-claimed, seeking indemnity from the federal defendants for any adverse money judgment based on their compliance with federally-mandated policies and procedures.[3]

A motion by plaintiffs requesting certification of a statewide class of blacks and females seeking referral from all state MSES offices, filed in 1974, was finally heard in February 1978. The court certified a class confined to persons seeking job referrals

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3. MSES, a division of the Mississippi Employment Security Commission, is a member of the national network of state employment services established by the Wagner-Peyser Act, 29 U.S.C. §§ 49 through 49K. Under the Act, federal funds in the form of grants covering operational costs are dispensed by USES to state employment services. Participating state services must adhere to USES policies and procedures, Espinoza v. Stokely-Van Camp, Inc., 641 F.2d 535 (7th Cir.), cert. denied, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), including those governing the classification, referral and testing of applicants. 20 C.F.R. §§ 653.1-653.13 (1982). During the relevant period many of these policies and procedures were set forth in the federal Employment Security Manual, a U.S. Department of Labor publication.

from the Bolivar County MSES branch.

In March 1978, the district court granted the federal defendants' motion for summary judgment,[4] ruling, inter alia, that the 1972 amendments to Title VII barred imposition of liability upon USES in the event classification, referral or testing functions performed by MSES under federal supervision were adjudged illegal. Because of the dual possibility that plenary

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4. Summary judgment was rendered in favor of the federal defendants on all claims asserted, the court having determined that: (1) Congress' omission of USES from the 1972 amendments to Title VII, Section 701(c), 42 U.S.C. § 2000e(c), as amended, manifested an intent to exonerate this entity from all potential claims of employment discrimination except those authorized under Section 717, 42 U.S.C. § 2000e-16; (2) plaintiffs had failed to exhaust their administrative remedies as a prelude to assertion of their Title VI claims, 42 U.S.C. § 2000d; (3) the United States was immune from suit under 42 U.S.C. § 1981 and the thirteenth amendment; (4) no allegation of intentional discrimination had been raised, pretermitting maintenance of a cause of action under the fifth amendment; and (5) no private right of action against the federal government could be implied from the terms of the Wagner-Peyser Act, as amended, 49 U.S.C. § 49-49k. Only the first determination is challenged on appeal.

injunctive relief could not be secured from the state defendants in the Secretary's absence, and the state might be entitled to indemnity should back-pay or attorneys' fees be assessed against it, the court declined to dismiss the state's cross-claim.

On appeal, plaintiffs challenge the district court's conclusion that referral of job applicants by the MSES office was free of race and gender discrimination. They further argue that the court erred in finding that employment tests administered by the Cleveland office were job-validated and did not impact adversely on black applicants. Plaintiffs challenge the court's admission of expert testimony on test validation, grant of summary judgment in favor of the federal defendants on the basis of the 1972 amendments to section 701(c), 42 U.S.C. § 2000e(c), and refusal to certify a statewide class.

Limitation of the Class

Plaintiffs sought certification of

a statewide class and the intervention of persons complaining of practices in MSES offices throughout the state. Finding the request untimely and concluding that a statewide class was unwieldy and unnecessary, the district court limited the class to Bolivar County and denied intervention. Appellate review of this ruling is governed by an abuse of discretion standard. Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir.), reh'g denied, 683 F.2d 417 (5th Cir.), cert. denied, U.S. , 103 S.Ct. 452, 74 L.Ed.2d (1982). Implicit in this deferential standard of review is the recognition of the essential factual nature of the certification inquiry and the district court's inherent power to manage and control pending litigation. When measured against this standard, we are not prepared to say that the district court's effort to efficiently manage this complex litigation constituted an abuse of

discretion. See McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554 (5th Cir. 1981).

Class Claims

A Title VII class action may be brought under two theories: disparate treatment or disparate impact. Either theory may prove applicable to the same set of facts. Wheeler v. City of Columbus, Miss., 686 F.2d 1144 (5th Cir. 1982). In a disparate treatment case the plaintiff class must prove the existence of a pattern and practice of race or gender-based discrimination. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Discriminatory intent must be established, by either direct or circumstantial evidence. Wheeler v. City of Columbus, Miss. Facially neutral practices which impact more severely on one group than another are subject to attack under the disparate impact theory.

Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); International Brotherhood of Teamsters v. United States. Proof of discriminatory purpose is not required in a disparate impact case.

Plaintiffs charge the MSES Cleveland office with racial and sexual discrimination in three practices: assignment of occupational codes, referrals, and testing.[5] All three practices allegedly impacted in a significantly adverse manner upon black and female applicants. Plaintiffs' cast their evidence as to each practice in the disparate impact model. However, we conclude that only the testing issue fits within this evidentiary framework.

A brief description of the operation of

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5. Evidence bearing on the interrelationship of the federal and state defendants was directed exclusively to the testing issue. Our analysis of the federal defendants' liability is thus circumscribed by the issue as joined and the evidence adduced.

the Cleveland office during the relevant period will assist in focusing the plaintiffs' class claims. This office, like all other MSES branch offices in Mississippi, functioned as a labor exchange, matching qualified applicants with available jobs. Employers make known openings by placing "job orders." Applicants make known their availability by requesting job referrals. The Cleveland office accounted for approximately 25% of all new hires in the Bolivar County labor market.

On the initial visit, each applicant was given an application form, questioned as to job preferences and directed to the interviewer who handled job codes corresponding to the preferences expressed. Until 1978, job codes were six-digit numbers representing a specific family of jobs in the federal Dictionary of Occupational Titles (DOT), a Department of Labor publication.[6]

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6. A specific six-digit numerical code (nine
(footnote continued)

(footnote continued)

digits since 1978) was assigned to each of the 20,000 job definitions incorporated in the DOT. These codes are organized into the following broad occupational categories, or families, symbolized by a single digit:

OCCUPATIONAL CATEGORIES

0/1	Professional, technical, and managerial occupations
2	Clerical and sales occupations
3	Service occupations
4	Agricultural, fishery, forestry, and related occupations
5	Processing occupations
6	Machine trades occupations
7	Benchwork occupations
8	Structural work occupations
9	Miscellaneous occupations

Subsumed within the nine major job families are more than 82 diverse, two-digit divisions. The families of particular importance in this case, the clerical and sales, service, and agricultural codes, are subdivided into a variety of occupations:

CLERICAL AND SALES OCCUPATIONS

20	Stenography, typing, filing, and related occupations
21	Computing and account-recording occupations
22	Production and stock clerks and related occupations
23	Information and message distribution occupations
24	Miscellaneous clerical occupations
25	Sales occupations, services
26	Sales occupations, consumable commodities
27	Sales occupations, commodities, n.e.c.
29	Miscellaneous sales occupations

(footnote continued)

(footnote continued)

SERVICE OCCUPATIONS

30 Domestic service occupations
31 Food and beverage preparation and service occupations
32 Lodging and related service occupations
33 Barbering, cosmetology, and related service occupations
34 Amusement and recreation service occupations
35 Miscellaneous personal service occupations
36 Apparel and furnishings service occupations
37 Protective service occupations
38 Building and related service occupations

AGRICULTURAL, FISHERY, FORESTRY AND RELATED OCCUPATIONS

40 Plant farming occupations
41 Animal farming occupations
42 Miscellaneous agricultural and related occupations
44 Fishery and related occupations
45 Forestry occupations
46 Hunting, trapping and related occupations

These subdivisions are in turn broken down into specialized fields. For example, included within the first division under the clerical and sales code, stenography, typing, filing, and related occupations, are:

201 Secretaries
202 Stenographers
203 Typists and typewriting-machine operators
205 Interviewing clerks
206 File clerks
207 Duplicating-machine operators and tenders
208 Mailing and miscellaneous office machine operators

Once routed to the appropriate interviewer, the applicant was assisted in completing the application form, and questioned about education, vocational training, work experience, skills, work preferences, and personal interests and characteristics. Based on this information, the interviewer selected and inscribed the appropriate DOT code on the application. Work experience was a primary consideration in the coding process, although other factors were weighed, including the types of employment available in the area. The code issued an applicant who was not fully qualified, lacked the requisite experience, or needed further training, included an "x."

The interviewer's duties included the processing of employer job orders. A typical order contained information from the employer concerning the job, the number of vacancies, the desired number of referrals per vacancy, and the education and experience thresholds required. Interviewers had authority to

determine whether any educational and experiential criterion was sufficiently job-related, and if not, whether further investigation was necessary before the job order was processed. Interviewers were encouraged to dissuade employers from imposing arbitrary hiring requirements, and job orders discriminating on the basis of sex or race were not to be serviced by MSES personnel. After obtaining the necessary information, the interviewer coded each job vacancy listed in the job order.

The matching and referral decision was facilitated by tests designed to ascertain job capabilities. In the absence of a sufficient number of applicants with a code identical to a job order, applicants with codes within the occupational family were referred. The discretion of the interviewer was unavoidably involved in this process.

Plaintiffs introduced extensive

documentary and testimonial evidence designed to show that the state defendants discriminated in the classification and referral of blacks and women, contrary to federally prescribed policies. Implicit in this claim is the contention that the interviewers abused their discretion in coding and referring. Plaintiffs also endeavored to prove that the battery of tests, albeit uniformly administered without regard to race, operated disproportionately to exclude blacks.

Because the classification and referral practices complained of effectively turn on discretionary decisions, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied. Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (5th Cir. 1982); C. Sullivan, M. Zimmer and R. Richards, Federal Statutory Law of Employment Discrimination, § 1.5(c) (1980).

Selection processes which rely on subjective judgments, despite the corraling by objective standards, provide the opportunity for the intentional discrimination cognizable in a disparate treatment action. See Payne v. Travenol Laboratories, Inc. We must therefore analyze plaintiffs' challenge to the classification and referral systems under the disparate treatment modality. Their challenge to the aptitude tests, generally regarded as neutral selection mechanisms, will be evaluated under the aegis of the disparate impact theory.

I. CLASSIFICATION AND REFERRAL

As noted, we evaluate the classification and referral claims under the disparate treatment theory, which requires proof of discriminatory animus. To prevail, plaintiffs must demonstrate more than "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [Rather they

must show] by a preponderance of the evidence that discrimination was the [defendants'] standard operating procedure---the regular rather than the unusual practice." International Brotherhood of Teamsters v. United States, 431 U.S. at 336, 97 S.Ct. at 1854. A prima facie case may be established by the use of statistics if a sufficiently substantial, or "gross," disparity in the treatment of the favored and disfavored groups can be shown. Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). In such cases statistical disparities, standing alone, may justify an inference of discriminatory motive. International Brotherhood of Teamsters v. United States; Payne v. Travenol Laboratories, Inc. Moreover, as we stated in Payne:

> The statistical showing of a disparate result may also be buttressed with evidence of a history of discrimination practiced by the employer, individual instances of discrimination, and opportunities

> to discriminate that exist in the employer's decision-making processes. If the statistical disparity is insufficient alone to establish a prima facie case, the plaintiff may get over his or her initial hurdle by combining statistics with historical, individual, or circumstantial evidence. (Citations omitted.)

673 F.2d at 817.

Should the plaintiff succeed in establishing a prima facie case, the defendant may overcome the presumption of discrimination thus raised by discrediting the plaintiff's statistical evidence or by advancing a nondiscriminatory rationale for what appeared to be discriminatory conduct. Wheeler v. City of Columbus, Miss.; Williams v. New Orleans Steamship Ass'n, 673 F.2d 742 (5th Cir.), reh'g denied, 688 F.2d 412 (5th Cir. 1982). Affirmations of good faith selection of the most qualified applicant will not satisfy this burden. Failure by defendants to rebut a prima facie case warrants the conclusion that Title VII has been

violated.

Statistical evidence must be regarded with a substantial degree of caution. See, New York Transit Auth. v. Beazer, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); Pouncy v. Prudential Ins. Co. of America. Although competent to prove employment discrimination, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances." International Brotherhood of Teamsters v. United States, 431 U.S. at 340, 97 S.Ct. at 1856. We have repeatedly warned of the need for considered and refined statistical analysis in the context of Title VII class actions. Pouncy v. Prudential Ins. Co. of America; Rivera v. City of Wichita Falls; Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), vacated and remanded,

U.S. , 103 S.Ct. 34, 74 L.Ed. 2d 47 (1982), aff'd on remand, 695 F.2d 134 (5th Cir. 1983).

Discrimination in Classification

Plaintiffs presented quantitative evidence of the disproportionate classification of blacks and women in stereotypic, less remunerative occupations during selected years between 1970 and 1976. No testimony, lay or expert, was offered to explain the significance of this data, nor was an appropriate test of statistical significance applied. Evidence of individual instances of discriminatory treatment of blacks and women during the classification process, and of the state defendants' noncompliance with federal directives, was also introduced. Without indicating whether such evidence, in the aggregate, sufficed to make out a prima facie case of discrimination, the district court concluded that plaintiffs had

failed to sustain their ultimate burden of proof under an impact theory.[7]

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7. There are no findings or conclusions set forth in the district court's opinion to support its rejection of plaintiffs' classification and referral claims, other than a detailed recitation of federal policies and regulations governing MSES's classification and referral functions, a discussion of the limited role of the Cleveland office in placing applicants, and general efforts made by MSES staff to obey the civil rights laws, the excellent relationship between the Cleveland office and the black community, and a conclusionary statement that the state defendants had at all times sought to classify and refer applicants without regard to race or sex. It is nonetheless clear, from the court's extensive and somewhat laudatory exposition of defendants' case, that it did not deem plaintiffs' evidence to be either credible or probative of discrimination. 488 F.Supp. at 243. Handicapped though we are by the dearth of specific factual findings, we proceed, in light of the recent death of the trial judge and the substantial passage of time since the inception of the lawsuit, to decide this case in the interests of justice and judicial economy. See Felder v. United States, 543 F.2d 657 (9th Cir. 1976).

Cognizant of the preferred practice of remand, we are loathe to return this voluminous record, including thousands of pages of testimony and myriad exhibits, to another trial judge for a transcript review. We may perform that function under circumstances as here presented, particularly since we find that the record is susceptible of only one resolution of the factual issues presented. United States v. Georgia Power Co., 695 F.2d 890 (5th Cir. 1983).

Several charts were offered to show a disproportionate classification of blacks in codes for less desirable service occupations, and of women in lower paying jobs. These exhibits reflect imbalances, but do not show that race or sex, rather than work preferences, experience, education, and the state of the job market caused the imbalances. As thus presented, these figures are of little probative value. D. Baldus & J. Cole, Statistical Proof of Discrimination, § 1.22[23] (1980).

At first glance, two related series of exhibits focusing on race in the classification of persons of equivalent education appear illuminating. Upon closer examination, the probative value dims.

In the first series, one exhibit reflected that in 1970, 90 black women and one white woman, all with at least eight years of education, were coded for domestic labor. Other

exhibits portrayed a continuation of this trend, to a lesser degree, in 1972, 1974 and 1976. Work preferences were identified for 1970 only; of the 44 coded as maids that year, 28 opted for non-domestic work. There was no analysis of this data and no quantification of the white women in the pool who received more desirable codes. The records do not show job preferences for 1972, 1974 and 1976, an omission which detracts from the weight of the figures and militates against any meaningful comparison of the races.

The second series of exhibits, organized according to educational levels, contrast black and white classifications for the year 1974. One exhibit reveals that 265 black women with an elementary school education, constituting 2/3 of the females in this category who applied in 1974, were coded for service occupations, while only 16 white women were similarly coded. Twelve black

and 9 white women in this cross-section of 1974 applicants were assigned the clerical and sales code characteristically dominated by whites; 2 black and 0 white women were assigned codes within the professional, managerial and technical category. Past experience, work preference, and the availability of alternate jobs at the time of interviewing, information which is contained in the record, were not compiled or considered by the plaintiffs. Nor were the figures subjected to statistical analysis.

The same comparative analysis was employed with respect to the classification, in 1974, of black and white men with no more than a seventh grade education. Again, such critical variables as epxerience, work preference and jobs available at the time each applicant was interviewed were not incorporated in the data, nor was statistical methodology utilized to discount the

possibility that apparent racial discrepancies were not due to random selection.

Substantial disparities in the assignment of service or farmwork codes to black and white men with an education at or above the eighth grade level were also shown pursuant to this analysis. Occupational preferences and job availability were again omitted. Work histories, although measured by the data, were widely divergent. No statistical test of significance was used to evaluate these disparities.

In the final series of exhibits, raw data in the form of seven charts, each of which lists the name, education, work preference and experience of applicants of a specific race/sex group, together with the codes assigned in the years 1970 and 1974, were offered. Plaintiffs produced no evidence which explained or collated this data for purposes of comparison between favored

and disfavored groups. The particular variant or variants to be compared among such groups was not disclosed. Scrutinizing these charts for differences in the classification of similarly qualified blacks and whites, or males and females, within a certain code, discloses that there is no indication of the size of the total applicant pool and the porportion thereof of each group. None of the recognized tests of statistical significance were performed in an attempt to demonstrate the unlikelihood that differential coding could be ascribed to chance rather than race or gender.

Reasoned assessment of disparities in classification of blacks and females evinced in these exhibits thus cannot be made. While precise calculations of statistical significance are not essential to statistical proof, Hazelwood School District v. United States, no valid conclusions

regarding the relationship of observed selection patterns to the defendants' behavior can be drawn absent some minimal framework for analysis. Plaintiffs bear this burden. See Rivera v. City of Wichita Falls; Vuyanich v. Republic Nat'l Bank of Dallas, 505 F.Supp. 224, 234 (N.D.Tex. 1980); A. Smith and T. Abram, Quantitative Analysis and Proof of Employment Discrimination, 1981 U.Ill.L.Rev. 33. Mindful though we are that simple comparisons of percentages are acceptable where a strong inference of discrimination has previously been raised, Rivera v. City of Wichita Falls, such is not the case here. No pattern or practice of discriminatory treatment is otherwise established by a combination of plaintiffs' anecdotal and statistical evidence. It is not for the court, trial or appellate, to search the voluminous record for data omitted from plaintiffs' comparative analyses, compensate

for the failure to filter out the combined effects of factors unrelated to race or sex, choose the appropriate statistical methodology, and insert therein select parts of the array of figures presented. See Miller v. Weber, 577 F.2d 75 (8th Cir. 1978). See generally Wilkins v. University of Houston.[8]

Discrimination in Referral

To establish a prima facie case of discrimination against class members in referrals, plaintiffs offered statistics, bolstered by historical, anecdotal and circumstantial evidence, to demonstrate that defendants disproportionately excluded qualified black and female applicants from employment opportunities. This comparative evidence was based on the assumption that all persons with the same job code were similarly

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8. Because we conclude that plaintiffs have failed to make out a prima facie case, we need not consider defendants' rebuttal evidence. See Pouncy v. Prudential Ins. Co. of America.

qualified for a particular occupation.

Plaintiffs first took aim at defendants' alleged practice of servicing discriminatory sexual preferences of employers. They offered evidence of a pattern of sexually segregated referrals to a major local employer, Travenol Laboratories, during the period December 1969 - May 1970. Women were referred exclusively to lower paid assembler jobs, and men to better paid material handler jobs, in statistically significant numbers.[9] Both were entry-level positions, demanding no special skills or training.

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9. The statistical disparities in this example approach the "inexorable zero" decried by the Supreme Court in International Brotherhood of Teamsters, 431 U.S. at 342 n. 23, 97 S.Ct. at 1858 n. 23. Standard deviation analysis was applied to these disparities to eliminate chance as a likely explanation for the revealed underrepresentation. Hazelwood School Dist. v. United States; Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). As defined in Castaneda, the standard deviation quantifies the probability that chance is responsible for

(footnote continued)

(footnote continued)

any difference between an expected outcome and the observed outcome in a sample comprised of a protected and nonprotected group (a binomial distribution). 430 U.S. at 496 n. 17, 97 S.Ct. at 1281 n. 7. As the number of standard deviations increases, the probability of chance as the cause of any difference between the expected and observed results diminishes. EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), reh'g denied, 680 F.2d 965 (4th Cir.), cert denied, U.S. , 103 S.Ct. 235, 74 L.Ed.2d 186 (1982). Generally speaking, in a sample equivalent in size to that evaluated in Castaneda, a difference between expected and observed values in excess of two or three standard deviations at the 5% significance level permits an inference of discrimination. See Harrell v. Northern Elec. Co., 672 F.2d 444 (5th Cir.), modified on reh'g, 679 F.2d 31 (5th Cir.), cert. denied, U.S. , 103 S.Ct. 449, 74 L.Ed.2d (1982).

In Harrell, 672 F.2d at 447 n. 5, we set forth a formula for computing standard deviations based on the Castaneda model. We delete therefrom the .5 correction factor used to compensate for Harrell's sample size, and specially note a publication error in the reproduction of the formula---the square root sign in the denominator was omitted. The correct formula for determining the number of standard deviations is:

$$\frac{NP - X}{\sqrt{NPQ}}$$

Tailored to the facts presented in the case at bar, N = total number of applicants referred; P = percentage of female applicants; and Q = percentage of male applicants.

Application of the formula to plaintiffs' data discloses that the difference between the expected and the observed number of women referred to Travenol

(footnote continued)

These statistical disparities gain added dimension when examined in the context of evidence that the Cleveland office accepted job orders in which the employer's gender preference was expressed. Also relevant in this regard are two admonitions issued by the Department of Labor in June 1968 and May 1969, ordering the Cleveland branch to cease the servicing of discriminatory employer sex preferences, and to investigate the validity of such preferences and record the results.

(footnote continued)

Laboratories' material handler jobs exceeded 17 standard deviations. Expected versus observed numbers of women referred to the female-dominated assembler jobs differ by more than 13 standard deviations. Both figures exceed the two or three standard deviations considered sufficient to undermine chance as the reason for the disparity.

Plaintiffs presented evidence of sex and race segregated referrals during a 14-month interval commencing November 1969, but failed to draw the requisite comparison between favored and disfavored groups, or to control for divergent qualifications possessed by applicants within either group. Accordingly, this evidence can at best be characterized as inconclusive, and does not function to enhance plaintiffs' prima facie showing.

The office did not investigate the suspect job orders processed after receipt of the Department of Labor's admonitions.

Plaintiffs also challenged defendants' systematic referral of applicants to positions other than those for which they were classified. In 1970, of the 68 persons referred out-of-code to the more attractive clerical and sales occupations, 58 were white. Eight of these individuals were overqualified according to their assigned code and may therefore be eliminated. In contrast, only 10 black persons were similarly referred, three overqualified. Conversely, of the 68 applicants referred out-of-code to less desirable service employment, 24 were white, three overqualified, and 34 black. These categories are further divided to show that 20 of the 21 white women referred to service jobs were matched with employers seeking waitresses, while 26

of the 34 black women receiving service referrals were accorded opportunities for stereotypical domestic or cook positions.

Cognizant of the lessened probative value of statistical evidence where the sample size is small, due to the incremental increase in the possibility of sampling error, we must nonetheless guard against an overly facile rejection of discrimination claims. Two conflicting interests must be weighed: the danger of prejudice to the defendant posed by drawing inferences of discrimination from evidence consisting of a handful of selection decisions, and the unfairness to the Title VII claimant of imposing unattainable standards for proof of discriminatory intent. EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), reh'g denied, 680 F.2d 965 (4th Cir.), cert. denied, U.S. , 103 S.Ct. 235, 74 L.Ed.2d 186 (1982). Given our conclusion that a discriminatory pattern of sexually disparate

referrals for a portion of 1970 has been demonstrated, we are satisfied that the evidence bearing on out-of-code referrals may properly serve to strengthen the prima facie case of discriminatory treatment.[10]

Plaintiffs next assail the state defendants' selection of applicants for referral on the basis of unvalidated educational requirements. As to the educational requirements, plaintiffs rely upon charts detailing what plaintiffs deem to be unreasonable minimum education requirements of certain employers for various job vacancies in 1970 and 1976, together with census data revealing lower levels of education among blacks and

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10. We have determined that one of the named plaintiffs, Rebecca Gillespie, proved an individual claim of disparate treatment in the context of referral. See slip op. p. 2983, p. , infra. Under the Teamsters analysis, this proof suggests a qualitative explanation for the prima facie showing heretofore made for 1970 on the basis of statistical and historical evidence. See Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981).

women in Mississippi. The lay witness who compiled these charts acknowledged employing her subjective judgment with respect to the reasonableness of a given educational requirement. A similar study on the experience requirements was likewise based on this witness' subjective determination of reasonableness. These rudimentary analyses did not purport to gauge the impact, in numerical terms, upon black and female applicants in Bolivar County by comparison with the appropriate cross-section of the relevant labor market. Absent proof of disparate impact, no invidious discrimination can be shown under the disparate treatment theory. Pouncy v. Prudential Ins. Co. of America; Rivera v. City of Wichita Falls.

Pointing to evidence that a disproportionately smaller percentage of black men and women were referred to available positions in 1970 than their concentration in

various referral pools (all applicants with a code corresponding to that of the job to which referrals were made) would justify, plaintiffs employed the standard deviation test approved in Castaneda v. Partida to show that the difference between actual and expected numbers of blacks referred was statistically significant. After painstaking study of the record, we conclude that the underlying data used to evaluate racial disparities in referrals of black men and women to clerical and sales occupations is so seriously flawed as to negate plaintiffs' suggestions of statistical significance.

The computational errors which undermine the value of calculations pertaining to the clerical and sales occupational codes are not extant in the other eight codes. However, the calculations as to these eight are not persuasive; they all fail to incorporate the primary factor influencing referral---

experience. There is no basis in the record for discounting the obvious significance of this factor. Absent due consideration of the experiential component of the referral decision, plaintiffs' standard deviation analyses furnish insufficient support for the proposition that defendants' referral decisions were tainted by racial bias.

Statistical evidence drawing comparisons between mean hourly rates of pay per referral, and encompassing referrals to occupations in all nine DOT code families from 1974 through 1978, was presented to demonstrate that average wages for black and female referrals were exceeded, in statistically significant proportions, by average wages for white and male referrals. Based on this data, plaintiffs' expert, Dr. Charles Mann, testified that application of a "two-tailed" test of significance, designed to determine whether differences in the mean

hourly wages of black, white and female referrals were statistically significant for the years 1974-1978, produced positive results. Dr. Mann's computations would appear to support an inference that the probability that protected group members were referred, on the average, to less remunerative employment because of chance alone was extremely small.

Albeit impressive, Dr. Mann's computations do not take into account the relative qualifications of persons referred during the relevant period. The referral pools upon which his analyses rest were not arranged so as to eliminate those who were denied referral to better paying positions because of the lack of necessary ability or skills. Pouncy v. Prudential Ins. Co. of America; Rivera v. City of Wichita Falls. Dr. Mann's model is grounded on the unfounded assumption that all persons were qualified for referral to higher paid jobs.

A more meaningful analysis would have compared minority and nonminority mean salaries for referrals falling within a single code family. This approach would have disclosed whether black and female applicants possessing education, experience and skills equivalent to those of their white and male co-applicants, were referred in disproportionate numbers to lower paying occupations. Because the raw data is deficient for failing to recognize that "a number of factors operate simultaneously to influence the amount of salary" associated with a particular referral, Wilkins v. University of Houston, 654 F.2d at 402, the findings of statistically significant disparities derived therefrom will not permit an inference of discrimination.[11]

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11. Plaintiffs concentrated much of their effort at trial on statewide data covering an undefined period culminating in March 1976, purportedly showing strong racial and gender disparities in

(footnote continued)

Plaintiffs contend that statistically significant discrepancies in the frequency of referrals for whites and blacks during the years 1974 through 1978 has been established. These data tell us nothing of the relative qualifications of blacks and whites in the available applicant pools, or of the requirements imposed by the employers to whom referrals were made. Factors other than race may explain the variations in referral rates observed. To conclude otherwise would necessitate an impermissible degree of speculation.

(footnote continued)

the pay rates of jobs to which referrals were made by each of the 82 branch offices within the MSES system. Dr. Mann testified, based on his performance of an accepted statistical test, that such disparities were statistically significant. Given our approval of limitations imposed by the district court on the scope of the class, such data has no relevance to the practices of the Cleveland office. Since the pertinent data have not been dissected out from those relating to other offices, Dr. Mann's statewide analyses are without probative value on the issues posited in this litigation.

There remains for consideration plaintiffs' claim that discrimination pervaded defendants' job development process, which entailed MSES solicitation of employer job orders on behalf of specific applicants for whom the office had no suitable openings. Job development could be undertaken for persons who either possessed unusual skills or training or who were difficult to place due to the paucity of jobs they could perform. A chart excerpting selected portions of defendants' evidence shows that on various dates during July 1974 through August 1978, the local office's self appraisals indicated that the percentage of black placements linked to job development was lower than the percentage of black applicants.

Plaintiffs' failure to narrow the applicant pool to those presumptively eligible for participation in the job development process, as above defined, prevents the comparison of

the number of blacks qualified for job development to the number receiving this service. We are not unmindful that defendants' reliance on the subjective judgment of their interviewers in arriving at a decision on specific job development casts doubt on the legitimacy of the process, Payne v. Travenol Laboratories, Inc., but are not persuaded that this element of subjectivity overcomes the fundamental defect in plaintiffs' figures. Standing alone, therefore, these statistics have insufficient probative value.

Defendants' Rebuttal

Much of the state defendants' statistical evidence, introduced through their expert, Dr. Linda Malone, was devoted to rebutting Dr. Mann's calculations of statistical evidence. Her analyses related to applicant rates of referral and mean salaries for the years 1974 through 1978, and did not address plaintiffs' prima facie proof of

discrimination in servicing of employer sex preferences between November 1969 and mid-1970, and out-of-code referrals in 1970. Given our rejection of Dr. Mann's statistical presentation and the restricted scope of defendants' rebuttal statistics, we need not review the probative value of Dr. Malone's studies.

This leads to our determination whether defendants' remaining evidence, primarily qualitative in nature, adequately counters plaintiffs' prima facie showing. First, as to evidence of sex-segregated referrals to Travenol, defendants contend that they subsequently terminated this practice. Second, defendants claim that five of the 36 employer gender preferences serviced by the Cleveland office were patently reasonable. Notwithstanding these assertions, the record contains no explanation for the different treatment accorded females and thus does not

shield the defendants from the consequences of their discriminatory practice.

Finally, defendants maintain that their conduct cannot be scrutinized in a vacuum, insisting that overwhelming evidence of their good faith efforts to assist black and female applicants within the confines of a depressed labor market mitigates against a finding of discrimination. Any ostensible discrepancies in the referral rates of members of the protected classes must, in their view, be attributed to the essentially rural character of the area and the severe educational and experiential deficiencies characteristic of Bolivar County's predominantly black population.

We have no doubt that the poor socio-economic conditions endemic to Bolivar County, fostered in part by the displacement of black agricultural workers following the mechanization of farm labor in the 1960s, predetermined work patterns in the area. MSES's Cleveland office endeavored to cope with the

resultant influx of uneducated and unskilled persons seeking employment by instituting comprehensive job training programs and, in the words of the district court, by doing "what they could by way of classification and referral to try to help the applicants obtain whatever suitable work might be available, without regard to ... race or sex." 488 F.Supp. at 245. It is likewise important to note that disparities in referrals of whites and blacks have been steadily narrowing over the years. Payne v. Travenol Laboratories, Inc.

Guided by Teamsters, however, we are not persuaded that such affirmations of good faith, coupled with evidence of improvement in referrals of black applicants, overcome plaintiffs' prima facie proof of sex and race-based discrimination during 1969-70. Accordingly, plaintiffs are entitled to judgment on their claim of classwide sex

discrimination during the limited period for which a pattern of disparate treatment was established. This cause shall be remanded for the fashioning of an appropriate remedy for the infractions occurring during the relevant 1969-70 period.

Discrimination in Testing

All MSES offices utilized certain vocational aptitude tests, developed and supplied to them by the Department of Labor through the USES. Three forms of test batteries are challenged: S-28 Tableworker, S-270 and S-270R Licensed Practical Nurse, and S-282 and S-282R Nurse Aide. Each of these batteries, termed a Specific Aptitude Test Battery (SATB), is comprised of two or more aptitudes measured by the General Aptitude Test Battery (GATB). Binding prescriptions for state agency use of the tests have been promulgated by the Department of Labor, and are set forth in Part II of the Employment Security Manual, Sections 9000-9999.

Since 1947, the Department of Labor has distributed differing versions of the SATB and GATB tests to the state employment services. Throughout the ensuing years USES has been engaged in research aimed at validating these tests for minorities. After the Supreme Court's decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), USES undertook a comprehensive revalidation program. An interim policy was instituted in the fall of 1972 to monitor state testing, pending completion of the revalidation program. This policy mandated the referral of minority group applicants in "not less than the same ratio as the minority group represented in the applicant flow in the local office area, provided there is a sufficient number of applicants who are otherwise qualified, consistent with Federal law." MSES' administration of S-28 was

governed by the interim policy until January 1973;[12] the LPN and Nurse Aide tests were thus regulated until the revalidation process was completed in the mid-1970s.

Title VII permits the administration of "any professionally developed ability test" on the condition that such test is not utilized to discriminate against persons protected by the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(h). Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). This selection technique must be evaluated pursuant to the disparate impact model. A plaintiff may establish a prima

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12. Tests that have been differentially validated or which did not appear to significantly impact upon blacks in a discriminatory manner were removed from the interim policy's strictures in January 1973. Although the S-28 Tableworker battery had last been validated in 1954, it was considered by USES to exert no adverse racial impact.

facie violation by demonstrating that a facially neutral examination exerts "a significantly discriminatory impact." Connecticut v. Teal, U.S. , 102 S.Ct. 2525, 2531, 73 L.Ed.2d 130 (1982).

If such an impact is demonstrated, whether by statistics or other evidence, the defendant is called upon to show that the examination is job-related, or bears "'a manifest relationship to the employment in question.'" Id. (quoting from Griggs v. Duke Power Co., 401 U.S. at 432, 91 S.Ct. at 854). The proponent of the test must establish its job performance validity. Ensley Branch of the N.A.A.C.P. v. Seibels, 616 F.2d 812 (5th Cir. 1980), cert. denied, 449 U.S. 1061, 101 S.Ct. 783, 784, 66 L.Ed.2d 603 (1981); Scott v. City of Anniston, Alabama, 597 F.2d 897 (5th Cir. 1979), cert. denied, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). If the defendant offers persuasive evidence, the

plaintiff may still prevail by proving that the use of the test was merely pretextual, Connecticut v. Teal, or that less discriminatory alternatives existed. Albemarle Paper Co. v. Moody.

To prove their claim that the Tablework-er, Nurse Aide and LPN tests excluded disproportionate numbers of blacks from referral, plaintiffs introduced statistical evidence comparing failure rates of white and black applicants. The district court determined that plaintiffs' proof did not establish a prima facie case of disparate impact, due principally to their mischaracterization of certain scores. 488 F.Supp. at 253.

Looking first to the possible impact of the S-28 examination, the pertinent data reflect that in 1971, 13 whites and 32 blacks scored "below norm." However, no perceptible barriers to referral existed for recipients of scores in the higher "below norm" range.

We thus lack a reliable statistical base from which to assess the significance of the observed disparity. See Connecticut v. Teal; Albemarle Paper Co. v. Moody.

A different approach was adopted by plaintiffs in an attempt to convince the district court that blacks were test-selected for referral to nurse's aide training at a county hospital in disproportionately fewer numbers than other applicants. From 1971 through 1976, 180 blacks (11.3%) and 278 persons of other racial or ethnic backgrounds, primarily white (49.3%), all of whom were classified under the nurse aide code, were referred to the hospital's training program. Application of the standard deviation formula to these figures by plaintiffs' expert, Dr. James Outzz, confirmed that the racial difference was statistically significant.

It is well settled that a plaintiff need not establish the adverse impact of an

aptitude test solely on the basis of comparative pass/fail rates of blacks and whites, but may proffer statistical proof of differences in the proportions of blacks and whites gaining entry to the desired employment opportunity. Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396, 637 F.2d 506 (8th Cir. 1980); James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), cert. denied, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976). Notwithstanding this rubric, the referral component of the applicant pool must be tied to test selection, the variable to be measured, before referral rates may be used as indicia of failure.

As the district court aptly observed, Dr. Outzz had no knowledge of whom among those referred had taken the nurse aide test.

Because the SATBs were developed to facilitate referral of inexperienced, untrained and entry level workers to skilled positions, they were not administered to experienced applicants who had manifested some proficiency in the occupation examined.[13] Information identifying members of the applicant pool tested, their scores, and their subsequent referral or nonreferral was available to plaintiffs, but was not collated. In light of this critical omission, we decline to infer from the opaque figures presented that all applicants referred to nurse's aide training were first required to take the S-282.

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13. Despite the district court's finding that Rebecca Gillespie, an experienced nurse's aide, had erroneously been required to undergo testing, there was no evidence that other experienced candidates for referral to the nurse aide training program, whether white or black, were similarly treated. We therefore attach no signifance to this isolated incident in analyzing plaintiffs' classwide data pertaining to nurse aide referrals.

A survey of S-270R scores of applicants assigned the licensed practical nurse code in the years 1970, 1972, 1974 and 1976, shows that of the 66 persons completing the S-270R battery, 13 of 29 blacks and 0 of 37 whites received a failing score. Test performances of 2 black and 2 white applicants are omitted. One black woman, tested by another agency, was referred to the county hospital for training. Plaintiffs describe the sample of applicants tested at one point as composed of 75 persons; at another point they refer to 62 persons.

Since the outlines of the relevant sample are imprecise, the majority and minority concentrations cannot be ascertained as a prelude to application of probability theory. Addition of the four persons for whom no data is available further distorts the figures. Where the sample size is small, a few test scores may significantly skew the overall disparity, thus reducing the

reliability of any inference which might be drawn from minority "fail" rates.

While the small size of the sample does not necessarily justify repudiation of plaintiffs' empirical analysis, we perceive none of the evidentiary signals of discrimination typically relied upon to bolster such analyses. S. Booth and J. McKay, Legal Constraints on Testing and Evolving Trends in The Law, 29 Emory L.J. 121, 157 (1980); see, e.g., James v. Stockham Valves and Fittings Co. Compare Rivera v. City of Wichita Falls (14 of 35 Mexican-Americans who applied in 4-year period failed employment test, statistically significant showings of adverse impact alone deemed sufficient to make out prima facie case); Wilkins v. University of Houston (issue of applicability of statistical methodology to small number of positions, 14, not resolved inasmuch as diverse and specialized credentials required).

Regardless of whether the injection of the element of uncertainty attributable to the size of the minority sample alone warrants rejection of plaintiffs' data, we are compelled to the view that this factor, in conjunction with the other problems above noted, preclude a reasoned evaluation of this data. We therefore perceive no prima facie case of disparate impact resulting from the administration of the S-270R test.

When viewed in the aggregate, the statistical evidence supports the district court's finding that the tests under consideration were not discriminatory in their impact upon black applicants. Absent proof that an employment test exerts a substantially disproportionate racial impact, no inquiry may be undertaken into its job relatedness, or validity. See Albemarle Paper Co. v. Moody; Rivera v. City of Wichita Falls; Moore v. Southwestern Bell Tel. Co., 593 F.2d 607

(5th Cir. 1979).[14]

Individual Claims

The four named plaintiffs, all of whom are black, appeal the district court's determination that they had not been discriminated against by the state defendants. In order to establish a prima facie case of disparate treatment, each plaintiff must prove: (1) membership in a protected group; (2) application and coding for an occupation for which the Cleveland office was making referrals; (3) failure to secure a referral; and

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14. Because we affirm the district court's determination that the disputed tests produced no disparate impact upon black referral candidates during the years involved in plaintiffs' studies, we do not address plaintiffs' averment that the state defendants transgressed USES's interim policy in administering the nurse aide and licensed practical nurse examinations beginning in September 1972, or the challenge to expert testimony on the job-validation issue. Nor is it necessary for us to reach the question whether the district court erred in construing the 1972 amendment to Section 701(c) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e(c), to relieve USES of putative liability for discriminatory testing. The question remains for another day.

(4) later referral of a nonmember of the protected group. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Upon the plaintiff's establishment of a prima facie case, the defendants are called upon to dispel the presumption of discriminatory treatment thus created by articulating a legitimate, nondiscriminatory reason for the particular plaintiff's treatment. If the defendants come forward with such proof, the plaintiff, who at all times retains the burden of persuasion, may demonstrate that the justification proffered by defendants was a mere pretext designed to conceal discrimination. This goal may be achieved either by proving that a discriminatory reason more likely motivated the defendants' action, or by discrediting the defendants' articulated

explanation. Texas Department of Community Affairs v. Burdine.

Applying the McDonnell-Douglas test, as modified, to the district court's findings of fact, 488 F.Supp. at 241-242, we conclude that three of the named plaintiffs, Pegues, Williams and Boyd, failed to adduce prima facie proof of intentional discrimination.[15] Although we attach no significance to the inability of plaintiffs to cite the referral of any similarly or less qualified male and/or white to positions to which they believe they should have been referred, they were obligated, at a minimum, to introduce evidence attesting to the availability of a position for which they were coded but were not

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15. Consistent with Pullman-Standard v. Swint, U.S. , 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), we may reverse a district court's finding on the question of discriminatory intent only if we are satisfied that this finding is clearly erroneous. Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982). We are not prepared to say that the district court's factual findings with respect to the claims of Pegues, Williams and Boyd are clearly erroneous.

referred. See Harrell v. Northern Elec. Co., 672 F.2d 444 (5th Cir.), modified on reh'g, 679 F.2d 31 (5th Cir.), cert. denied, U.S. , 103 S.Ct. 449, 74 L.Ed.2d (1982). We discern no such evidence in the record.

As to Rebecca Gillespie, however, we find that a prima facie case has been demonstrated. Gillespie was a black female with an eighth grade education and experience as a waitress, maid and factory worker. She first applied to the Cleveland office in 1968, and expressed a desire for anything but domestic labor, including in particular a job at Travenol Laboratories. Notwithstanding her background and stated preference, she was coded for service work. Upon earning a 10th grade GED certificate in July 1971, and being aware of Travenol's educational criterion, she advised the Cleveland office of her achievement and repeated her request for a factory referral. Her coding was not

re-evaluated in light of this pertinent change in circumstances. Defendant Lindsey testified that the office was still engaged in referring applicants to Travenol at the time of Gillespie's July 1971 visit. Although not formally rejected, Gillespie was passed over in favor of other, similarly qualified applicants, some of whom were white.

By way of rebuttal, defendants elicited testimony from Gillespie as to her five full-term pregnancies between 1970 and 1975, and various benefits in the form of training and referral that defendants had conferred upon her between 1968 and 1970. The record reflects that at this time Travenol relied exclusively upon MSES referrals to fill vacant factory positions. Therefore, Gillespie could not have secured a position without assistance from the Cleveland office. Given her factory experience and enhanced education,

we do not believe the reasons articulated constitute a legitimate rationale for defendants' failure to reconsider her service classification and provide an opportunity for employment at Travenol. She is entitled to relief.

Conclusion

We conclude that plaintiffs succeeded in establishing a pattern and practice of race and sex-based disparate treatment during 1969 and 1970. We further conclude that Rebecca Gillespie has sufficiently proven her individual claim of discrimination. We render judgment accordingly, thus modifying the decision of the district court which, in all other respects, is affirmed. We remand for entry of a decree on liability in accordance herewith, and for further proceedings as may be deemed necessary for the fashioning of an appropriate remedy.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROSIE LEE PEGUES, et al.,

Plaintiffs,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, et al.,

Defendants.

488 F.Supp. 239 (March 7, 1980)

MEMORANDUM OF DECISION

ORMA R. SMITH, District Judge:

This action has been submitted to the court for decision after a fourteen-day trial on the merits in which all parties participated.

The court has received the memoranda of the parties and post-trial proposed findings of fact and conclusions of law. After a careful study of the evidence presented, the court has concluded for the reasons hereinafter given, that plaintiffs cannot prevail and the complaint must be dismissed.

I. The Parties

The plaintiffs, Rosie Lee Pegues, Rebecca Gillespie, Mary Boyd and Robert Williams are members of the black race. They reside in or near Bolivar County, Mississippi, and were job applicants at the Bolivar County or Cleveland, Mississippi local office (hereafter sometimes referred to as the "Cleveland MSES office", or the "Cleveland office") of the Mississippi State Employment Service (MSES). They have been permitted to prosecute a class action for the benefit of all black and female job applicants at the Cleveland MSES office who have received or may receive in the future, disparate treatment at the hands of the personnel at that office.

The defendants are:

1. The Mississippi State Employment Service (MSES), a division of the Mississippi Employment Security Commission.

2. John E. Aldridge, a resident of

Hinds County, Mississippi. Mr. Aldridge was the Executive Director of the Mississippi Employment Security Commission from July 16, 1960, until his retirement at the end of February 1978.

3. Ernest C. Lindsey, a resident of Cleveland, Bolivar County, Mississippi. Mr. Lindsey has been, and is presently, office manager of the Cleveland MSES office, serving in this capacity since November 1968.

4. The United States Secretary of Labor, currently the Honorable Ray Marshall, a resident of Washington, D.C.

5. The United States Department of Labor, represented herein by the Atlanta Georgia office of the United States Employment Service (USES).

The Federal Defendants, that is to say the Secretary of Labor, The Labor Department, and USES, have been released from the suit by prior order of the court except for their

role as defendants to the third-party complaint of MSES, and other state defendants.

II. Jurisdiction

The action is predicated on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; 42 U.S.C. §§ 1981, 1983, and the Thirteenth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is vested pursuant to 28 U.S.C. § 1343(3) and (4).

III. The Issues

The named plaintiffs contend that the Cleveland MSES office discriminated against them because of their race and sex in classifying them for employment referrals and in making referrals. Defendants Aldridge and Lindsey are said to be personally liable to plaintiffs and members of their class because they knowingly participated in the action of the Cleveland MSES office in its discriminatory conduct.

The class represented by plaintiffs is described as a class of black persons and females who have sought, or in the future may seek, employment opportunities through referrals by the Cleveland MSES office and who claim that they have been, or in the future may be, the target of discrimination on the basis of race or sex.

The State Defendants claim indemnity from the Federal Defendants for any monetary recovery for which the State Defendants are held liable on account of back pay to plaintiffs or class members, suit costs, etc., in the event of an adverse judgment in the action. The State Defendants also seek injunctive relief from the Federal Defendants should the same become appropriate.

IV. Plaintiffs' Evidence

A. The Named Plaintiffs

1. Rosie Lee Pegues did not appear or testify at the trial of the case. Her

record [SD Exhibit 58] reveals that at the time of the events upon which her Title VII charge was based, she was forty-six years of age. Her education was at the sixth grade level. The "Adult Basic Learning Examination" administered to her revealed a reading level of third grade, and math level of fourth grade. Her previous work history was in the field of farm work, maid, kitchen help, and housecleaning. She had also worked five months with the Headstart Program in Merigold, Mississippi. On her application Form 511, under "Type work preferred," she wrote she was not willing to accept a job out of the area. The 511 form reveals that she had been referred to the STAR Program [Systematic Training and Redevelopment] at Mound Bayou, Mississippi, a program designed to provide training to help remove employment barriers from persons with low educational, training, skill and experience levels. She participated

in the program, but the program was terminated for lack of funds before it was completed. There was also an entry of termination for "loss of interest" on status change notice dated December 4, 1969, in her STAR file.

2. Rebecca Gillespie, at the time of the events upon which her Title VII charge was based, was twenty-eight years of age. Her education was at the eighth grade level, with tenth grade equivalency later achieved. The "Adult Basic Learning Examination" administered to her revealed a reading level of fifth grade, and math level of fifth grade. Her previous early work history was in a factory for one year [Alabama Metal, Rosedale, Mississippi], and as a cook-helper with the Headstart Program at Pace, Mississippi. She later worked as a nurse aide. She, too, had been referred to the STAR program to assist in removing her employment barriers,

and participated in the program until it was terminated. Before enrolling in that program, she had been referred by MSES to a job at Misceramic Tile, where she was not hired, and at the Bar B Q House, where she was hired, and worked for three days. September 26, 1969, counseling insert form shows "Mainstream [MDTA] for nurse aid when slot develops." During the time when this applicant was seeking employment through the Cleveland MSES office (1968 - 1975) she completed five full term pregnancies. She testified that during parts of the relevant time period she was earning about $25.00 per day hauling farm labor with her truck.

3. Mary Boyd, at the time of the events upon which her Title VII charge was based, was forty-nine years of age. Her education was at the sixth grade level. The "Adult Basic Learning Examination" administered to her revealed a reading level of fourth grade

and math level of fourth grade. Her previous work history was in the field of farm work and housecleaning. Her type work preferred was "nurse aide training" or "cafe." She, too, had been referred to the STAR program to assist in removing her employment barriers, and participated in the program until it was terminated. In 1971 she was referred by the Cleveland MSES office to nurse aide training, and upon completion was referred to Community Hospital in Mound Bayou, where she was hired as a nurse aide.

4. Robert Williams, at the time of the events upon which his Title VII charge was based, was thirty-six years of age. His education was at the second grade level. The "Adult Basic Learning Examination" administered to him revealed a reading level of below first grade, and math level of second grade. His previous work history was tractor driving and other farm work.

He, too, had been referred to the STAR program to assist in removing his employment barriers, and participated in the program until it was terminated.

None of the named plaintiffs who testified was able to cite any referral of a white or a male who was less qualified than they, or similarly qualified, to any job which named plaintiffs believed they should have been referred to. The testimony of these plaintiffs showed that they were well aware of their employment barriers, and that they were making an effort to remove those barriers. Plaintiff Boyd testified that she had no objection to being classified or referred as a maid, and plaintiff Williams testified that janitorial type work was about all that he was capable of doing. In addition to the STAR training, defendants MSES also furnished other counseling and training opportunities to the named plaintiffs in an

effort to prepare them for entry into the Bolivar County job market at the highest level for which they might be qualified. On or about February 27, 1970, named plaintiffs filed Title VII charges against MSES, charging discriminatory service to them.

None of the plaintiffs who testified had any dealings with defendants Lindsey or Aldridge, or knew who they were.

B. Members of Plaintiff Class

Testimony was taken from some seventeen other black applicants, male and female, who were seeking employment and who sought the services of the Cleveland MSES office toward that end. These witnesses, with varying qualifications, were rendered various services by the Cleveland MSES office. There was no credible testimony from these witnesses that any white, or male, job applicant less qualified, or similarly qualified, was referred to any job which these members of the

plaintiff class believed they should have been referred to. There was evidence of referral to Baxter Laboratories, as well as to other desirable employers, and evidence of various other appropriate services rendered by the Cleveland MSES office to this group of plaintiffs. Some did not respond to MSES "call in cards", and their applications were inactivated pursuant to Employment Security Manual provisions.

One of these witnesses, Adeline Ward Brown, who complained that she was classified in a code for domestic maid was referred to a job at Baxter Laboratories a week later. The use of one classification would not prevent the referral to a job in another code, if such a suitable job became available.

Testimony on behalf of plaintiffs relating to services rendered to black and female applicants dealt with various individual complaints, and surmised that better service should have been rendered to them.

C. Plaintiffs' Statistical and Expert Evidence.

Plaintiffs, through the pretrial discovery process, were afforded a great number of documents by both state and federal defendants. They were also furnished a massive amount of factual information by way of answers given to interrogatories propounded to the defendants.

Based upon the information secured through the sources just mentioned plaintiffs prepared a detailed computer printout to summarize the information obtained so as to present the same to the court in understandable form. The printout was used as a basis for the preparation of charts and schedules by plaintiffs for presentation as evidence to the court.

From the information obtained at the pretrial stage by the parties, a stipulation was prepared and furnished the court at trial. The instrument contained a list of

approximately 109 stipulations of fact which the parties agreed would not be controverted.

Using this wealth of material, plaintiffs' analyst prepared numerous charts which were alleged to contain evidence of discrimination on the basis of race and sex by the state and federal defendants in the processing of applications for referrals and in making referrals on job orders at the Cleveland MSES office.

Based upon the charts and information of record, plaintiffs' experts opined that the named plaintiffs and members of the class had been and were being discriminated against on the basis of race and sex by defendants through the Cleveland MSES office in processing applicants for job referrals and in making referrals on job orders received from prospective employers.

For the reasons hereinafter given, the court finds that the testimony of the experts and analyst introduced by plaintiffs,

was not sufficient to support plaintiffs' burden of proof on the issues involved.

V. The Defendants' Evidence

A. Operation of the Cleveland Office of MSES

1. Service to Applicants

Ernest C. Lindsey, the manager of the Cleveland office since 1968, and a defendant in both his official and personal capacity, was called by the plaintiffs as an adverse witness. He testified at length and in considerable detail, on cross-examination and later on direct, about the operations of his office and the procedures that are used to serve the job applicants who come into that office. These procedures are for the most part performed pursuant to the Employment Security Manual, a detailed guide to the operation of the local office. The services rendered to the job applicant may be summarized as follows:

The applicant is greeted by the

receptionist, who, after initial interview, refers him to the interviewer who handles the Dictionary of Occupational Titles [DOT] job code families which appear to be of principal interest to the applicant. The applicant completes his application form [No. 511] with assistance as necessary from the interviewer. A copy of the form appears as an appendix hereto. A dialogue ensues between the applicant and the interviewer for the purpose of developing all available information that is pertinent to determining the applicant's training, skills, work experience, education, interests, preferences, availability, and aptitudes, so that a satisfactory classification or coding can be made, within the framework of the 20,000 job codes contained in the DOT, and also within the framework of the jobs that are available in the area served by the Cleveland office. The occupational code is a nine-digit designation. Other services

rendered include counseling, when an applicant is uncertain of his area of interest, or otherwise appears in need of further assistance in his job search, and referral to training in an appropriate case. The office also has available in its Career Development Unit the CETA, Comprehensive Employment and Training Act, and WIN, Work Incentive Program, services for those who are eligible for those special programs.

The basic function of the local office is to match people with jobs. The two aspects of the function are to attempt to refer the applicant to the best available job for which he is qualified, and to refer on a job order the best qualified applicant available. The Cleveland office is limited in its performance of that function by the fact that the only jobs with which it can match applicants are those contained on job orders placed with it by employers in the community.

The Cleveland office's share of the total job market is predominantly rural. Bolivar County is a small percentage thereof. [See State Defendants' Exhibit 32.] Another limitation on its performance of that function is the great imbalance between the number of job applicants and the number of job openings listed with the Cleveland office at any given time. Mr. Lindsey estimated this ratio to be about 5 to 1. Another limitation is the mandated Veterans' Preference which MSES follows in its referrals.

MSES uses only those tests which have been approved by the Department of Labor, and only in accordance with the instructions of the Department of Labor.

Testimony by Mr. Lindsey based on random examination of referrals on job orders disclosed that referrals on various jobs, including the most desirable and best paying, were made without regard to the race or sex of the applicants referred.

2. The Taking of Job Orders

The interviewer obtains from the employer who wishes to place a job order with the MSES office the necessary information to complete the job order form [No. 514]. A copy of the form appears as an appendix hereto. The form includes all pertinent information available that will assist the interviewer in filling the order, including the details of the job's requirements and the employer's education and experience requirements for the job. A DOT code is arrived at for the job. This number classification is the nine-digit code from the Dictionary of Occupational Titles referred to above, and is used in the process of matching applicants with jobs.

3. EEOC and Civil Rights Law Compliance in Bolivar County

The Cleveland office from the time of the passage and implementation of the Civil Rights Act of 1964 took steps to assure that its employees were aware of the provisions

of the Act insofar as it applied to the operations of that office. Such steps included the signing of a log by all employees that they had read and were familiar with those provisions, use of self-study packages, development and use of a practical Training Unit, regular self-appraisal study and reports, on-going emphasis at staff meetings, and periodic evaluation by the EEO officer of the Mississippi Employment Security Commission. Detailed procedures were developed for the investigation, reporting and processing of Title VII charges, and directives for the placement of posters, and other publicity, were complied with. Minority forums were held for the purpose of maintaining a good rapport with the local black community, and monthly "Opportunity News Letters" were distributed broadly in the black community of Bolivar County, keeping the community posted on the varied range of services

available at the Cleveland office. The manager regularly gives talks in the community, particularly at schools and training sites, about the Job Bank Viewers, how to use them, and the opportunities for employment that they contain.

The regular self-appraisal and evaluation report [Form AP-3] referred to above was periodically completed with positive showings, from random samplings of applications and job order referrals, of services rendered to protected minorities. [See SD Exhibits 44-45].

The Cleveland office in following the various procedures for assisting applicants in their job search did not make any distinction between applicants because of their race or their sex. A large percentage of the clientele of this office were members of the black race, and the employees of the Cleveland office performed their duties, within the limitations mentioned above, for

all applicants on the same basis--that is, treating each applicant as an individual, different from every other individual, in his training, work experience, aptitudes, education, job preferences, and availability.

From 1965 until the present, there have been 30 black employees in the Cleveland office, with job titles ranging from Farm Placement Representative to Employment Interviewer. At the present time, out of a total staff of 11 persons, 4 are black. Their job titles are Employment Interviewer II [two with this title], Employment Interviewer I and Employment Security Aide III.

With the scarcity of job openings on file in the Cleveland office, the MSES employees in that office did what they could by way of classification and referral to try to help the applicants obtain whatever suitable work might be available, without regard to the applicant's race or sex.

B. State Defendants' Witnesses

1. Testimony of Evelyn Lyon, longtime employee in the Cleveland MSES office, was to the effect that as Supervisor of the Career Development Unit in that office her primary responsibilities were to advise and counsel with those individuals who were eligible to participate in such special federal programs as CETA and WIN, and that her clients were predominantly black. She related several instances of such services rendered, which plainly showed exemplary attitude and service, without regard to race or sex of the individual client. She also testified about the counseling services rendered in the Cleveland local office, and its use as an employability development tool. She testified also as to the high rate of "positive terminations" for blacks in the CETA program.

2. John E. Aldridge, former executive

director of MSES, and a defendant in both his official and individual capacities, testified as to the administrative procedures adhered to during his tenure in office, and particularly the lines of communication and lines of authority from his office down to the local office manager's level. He testified that at all relevant times the various directives from DOL were implemented and properly disseminated to the field, and that diligent efforts were made to comply with the requirements of the Civil Rights Law of 1964, to assure that all services rendered by MESC were without regard to race or sex.

3. Reverend J.Y. Trice and Calvin Jones, both educators and leaders in the Bolivar County black community, testified as to the excellent rapport and reputation for good service enjoyed by the Cleveland MSES office in that community. They also related instances of such good service with which they

were personally familiar. They further testified as to the high black unemployment rate in Bolivar County, and the high incidence of unskilled black labor in the County, and that with the applicant-job opening ratio being what it was, they believed the Cleveland MSES office was doing the best it could to help blacks find employment.

4. There were five black job applicants who testified for the state defendants, and related the good and productive services that had been rendered for them. They were Richard Collins, Lillie Mae Edwards, Elexo Warrne, Mary Causey, and Marilyn Patton. They testified that their advice to a friend seeking work would be to consult the Cleveland MSES office for help. These witnesses were sincere and credible, and their testimony revealed what may be considered typical service rendered without regard to race or sex.

5. George Nash, a black employee in the Cleveland MSES office, presently contract writer with additional duties as employment interviewer, testified at length about his duties as well as the procedures followed in the Cleveland office in serving an applicant who comes in--from his reception at the front desk, to the final interview, and referral to a job--with reference to the applicable Employment Service Manual provisions followed. His testimony paralleled that of Ernest Lindsey in many respects. He has been with MESC for about eleven years, and previously held positions of CEP outreach worker, and employment interviewer.

6. Don Drane, presently manager of the Greenville MSES office, testified as to his earlier employment at the Cleveland office when he worked with the named plaintiffs in the CEP program. He identified certain of the CEP and STAR records pertaining to those

individuals, and testified as to the purposes behind the CEP, STAR, and related programs, and the strong efforts made by the Cleveland MSES office to help the participants or enrollees in those programs to remove their employment barriers, and obtain productive employment.

7. Louis Beverly, the MESC EEO Officer, and a black, testified concerning the duties of his office, and particularly about his observations and evaluations of the Cleveland MSES office over a period of years. He has served in this position since 1972. He reviewed several evaluation reports which he had made on that office, and related his conclusions as to the positive, ongoing efforts which have been and are being made there in service to applicants without regard to race or sex. [See S-D Exhibits 56, 57, and 80.]

8. Charles Ballard, Assistant Director, Employment Service Division, who has been with

MESC for over forty years, testified about the relationship between the Department of Labor and the MESC, and the Employment Security Manual and its directives for local office operations. His testimony further covered the period of time when he was Chief of Programs & Methods Department for MESC, when in that capacity his department supervised the administration of tests. His testimony was that the Cleveland MSES office at all times complied with DOL directives and procedures in the use of tests. He further testified that if there was ever any doubt about the appropriate use of a test, his department would always clear it with the DOL before going ahead with such use.

C. The Relationship of State and Federal Defendants

1. The Mississippi State Employment Service (MSES) is a division of the Mississippi Employment Security Commission. MSES is a State operated employment service within the

system of State and local employment services receiving Federal assistance under the Wagner-Peyser Act, 29 U.S.C. § 49-49K. MSES maintains and operates employment agencies throughout the state.

2. Under the system of "cooperative federalism" envisioned by the Wagner-Peyser Act, the Secretary of Labor makes grants to pay the administrative costs of operating State Employment Service Agencies. The various State agencies are created by the State law and are operated as agencies of State government. Through his authority as grantor of the funds for the state agencies, the Secretary of Labor exercises general supervisory authority over these State employment services. The Secretary of Labor prescribes the general policies under which the State employment service agency performs its functions. Particularly in the field of client service at the local office area,

Federal policy provides for wide flexibility and discretion to State personnel in the performance of their duties.

3. Section 602 of the Civil Rights Act directs Federal departments and agencies empowered to extend Federal financial assistance "to any program or activity, by way of grant, loan or contract" to effectuate the purpose of the Act by issuing implementing rules and regulations. The Secretary of Labor on December 4, 1964 published implementing regulations applicable to the Employment Service as well as other departmental programs in the Federal Register (at pp. 16284-16287 as Part 31 of Title 29 of the Code of Federal Regulations). Implementing instructions were also incorporated in the Employment Security Manual (ESM) Part II Sec. 1294. (FD exhibit 51).

4. The Secretary of Labor also issued to all State employment security agencies,

including MSES policies and instructions designed to forbid and avoid discrimination in referral, classification or testing and these policies and the instructions are legal and effective. These policy statements include:

(a) General Administration Letter 833, December 31, 1964, Nondiscrimination in Federally Assisted Programs of the Department of Labor - Effectuation of Title VI of the Civil Rights Act of 1964 - with attached copy of 29 C.F.R. Part 31 (FD Exhibit 7).

(b) United States Employment Service Program Letter 1919, November 9, 1965, Employment Practices under Title VII of the Civil Rights Act of 1964. This order superseded any conflicting instructions in the Employment Service Manual (ESM) with respect to implementation of Title VII of the Civil Rights Act of 1964. Its purpose was to

discontinue the noting of sex and age specifications in Job Bank Job Order listing (FD Exhibit 9).

(c) General Administration Letter 1054, February 1, 1967, Conformance with the Provisions of Title VII of the Civil Rights Act of 1964 which Prohibits Sex Discrimination in Employment and Training Programs. Its purpose was to assure full compliance with the sex discrimination provisions of Title VII of the Civil Rights Act of 1967 [sic]. (FD Exhibit 17).

(d) Training and Employment Service Program Letter 2582, October 9, 1970, Discriminatory Specifications on Job Bank Job Order Listings. Its purpose was to discontinue the noting of sex and age specifications in Job Bank Job Order listings. (FD Exhibit 11).

(e) Training and Employment

Service Program Letter, December 27, 1971, Elimination of Comments on Personal Traits and Characteristics on Application and Order forms, instructed State agencies to eliminate and delete all comments on personal traits and characteristics on Application Forms, ES-511 and Order Form, ES-514 since they can be unfairly discriminatory. (FD Exhibit 13).

(f) U.S. Employment Service Program Letter, 2698, May 17, 1966, Guidelines on Sex Discrimination Provisions of Title VII of Civil Rights Act of 1964. Disseminated additional information on the guidelines concerning the sex discrimination provisions of Title VII and attaching EEOC guidelines on sex discrimination. (FD Exhibit 15).

(g) General Administration Letter 1466, July 5, 1972, EEO Guidelines on

Discrimination Because of Sex. To inform State agencies of the New EEOC Guidelines on Discrimination Because of Sex. (FD Exhibit 19).

(h) Training and Employment Service Program Letter No. 2756, Proper Use of General Aptitude Test Battery (GATB), in Counseling and New Policy on Use of Specific Aptitude Test Battery (SATB) in Selection. To reemphasize the need for careful interpretation of GATB test results in counseling particularly when working with minority group applicants and to issue a new interim referral policy to assure that minority group applicants are not discriminated against in testing and selection for referral to jobs. (Stipulation Exhibit 56).

(i) Training and Employment Service Program Letter No. 2756, Change 1; issued a list of SATB's that may be used in

selection in accordance with standard Employment Security Manual procedures. (Stipulation Exhibit 57).

(j) General Administration Letter No. 18-79 Uniform Guidelines on Employee Selection Procedures (1978), transmitting the Guidelines and to provide information on the implementation of the Guidelines. (FD Exhibit 54).

5. State Employment Service Agencies are required to follow the policies stated in the Employment Security Manual (ESM). The purpose of the ESM is to set the minimum standards for operating the State employment services. 29 U.S.C. § 49b. These standards can be altered or expanded to fit the State's particular labor market.

The States have flexibility in running their employment services provided they do not violate Department of Labor policies or operate below the minimum standards as set

forth in the ESM or instructions. (FD Exhibit 51 unless otherwise noted.) Those policies include:

(a) The classification of an applicant in terms of the Dictionary of Occupational Titles (DOT) on the basis of an evaluation of all occupational qualifications as shown by work experience, training and personal characteristics; not to extend preference to any applicant or group, except in accordance with legal requirements and to ensure, as far as practicable, that applicants suitably qualified for job openings are referred to employers. ESM Part II, § 1005.

(b) The application process as a part of the placement process in which the interviewer reviews, analyzes and completes information on applicant qualifications, determines the need for

counseling and gives the applicant information which may increase his or her opportunities for placement. ESM Part § 1010.

(c) Work experience as a major source of an applicant's occupational qualifications. It is essential for the interviewer to consider all significant variable factors. ESM Part § 1066.

(d) Personal characteristics, including vocational interests and preference, must be considered in determining occupational qualifications in addition to information on work experience and training. ESM Part II § 1070.

(e) Interviewers explain to the applicant the various occupational codes (DOT) for which they qualify and ask them to state occupational preferences. When the applicant's preferred occupational code is not assigned, justification of the assignment should be noted

on the application card. ESM Part II § 1090.

(f) Interviewers explain the method of operation of the local office so the applicant understands the method of selection, and explains the meaning of any occupational title and skills if requested by the applicant. ESM Part II, § 1100.

(g) The interview for the assigning of occupational (DOT) classifications of applicants is a fact finding process. Occupational classification shall be assigned solely on the basis of factors bearing on job performance and no classifications shall be made on the basis of or influenced by race, creed, color or national origin. ESM Part II, § 1190.

(h) In making an occupational classification the interviewer evaluates evidence of an applicant's

qualifications, determines a specific job or jobs or fields of work to which significant evidence points and compares the skills, knowledge and the ability of the applicant with the code requirements. The interviewer discusses the possible classifications with the applicant. ESM Part II, § 1191.

(i) An interviewer should rarely consider personal characteristics alone. However, with inexperienced applicants an interviewer may be forced to consider personal characteristics such as personal status, aptitudes, personal traits and vocational interests. ESM Part II § 1198.

(j) The interviewer in consultation with the applicant develops one or more occupational codes and picks one as the primary code. Where opportunities for employment are limited the

interviewer insures that there is at least one additional classification for which there is a specific or general opportunity for work. ESM Part II § 1203.

(k) The interviewer informs the applicant of all codes assigned to him or her. In some cases, this discussion will bring to light any conflicts over the assignment of codes. ESM Part II § 1205.

(l) Job opportunities for unskilled workers may be increased by the use of summary job code groups. This technique consists of grouping related processes or functions which normally require familiarly [sic] with the industrial or occupational environment but in which specific experience requirements do not justify a full five or six digit code. The Mississippi Employment Service

Manual does not contain a similar section. ESM Part II, § 1225.

(m) Order taking is the process the interviewer uses for gathering information about the job from the employer for referral purposes. The nature of the job may be such that the interviewer may gather the necessary information about job content and worker qualifications by means of an interview with the employer. Other jobs may be sufficiently complex that information is more effectively obtained by actual observation of the job. ESM, Part II § 1250.

(n) The local office is prohibited from processing job orders that are contrary to Federal, State or local laws. ESM Part II § 1290.

(o) The local office is prohibited from processing employer job orders where there is evidence or information

that the employer discriminates by race, color or national origin. Any employer specifications that result in the exclusion of applicants of a particular race, color or national origin are discriminatory even though the employer specifications are not expressly discriminatory. Although this section does not list every conceivable form of discrimination the instructions are sufficient to put local offices on notice of the types of discrimination that may exist. ESM Part II § 1294.

(p) The selection of applicants for referral involves a 3-step process: determining performance/non-performance job requirements, accurately determining applicant qualifications and preferences, and a point by point comparison of qualifications and job requirements. ESM Part II § 1450.

(q) In selecting applicants for referral the interviewer must beware of hiring requirements which have little or no relation to work performance requirements. ESM Part II § 1461.

(r) The interviewer, in making a referral, should consider the factors influencing the applicant's acceptance of the referral. The vocational interests and substantiated interests of the applicant deserve careful consideration in deciding the appropriateness of the job referral. ESM Part II, § 1507.

(s) Since applicants rarely exactly meet all of an employer's requirements, the interviewer should discuss the applicant's qualifications with the employer in order to effect a compromise such that the employer will relax non-performance requirements in favor of otherwise acceptable applicants. ESM,

Part II § 1508.

(t) The local office cannot make referrals on orders containing discriminatory specifications with respect to race, creed, color or national origin. ESM Part II, § 1650.

(u) Employment service local offices should give necessary emphasis and attention to carry out employment service functions, including relations with minority applicants, employers and the community in such a manner as will best promote nondiscriminatory employer employment practices. ESM Part II §§ 8100-8170. (FD Exhibit 52).

(v) The objective of the employment service in providing services to women is to assure that they are given equal consideration for employment opportunities and any other needed services. Job classifications should be made to provide

maximum exposure to job openings, and special care should be taken to avoid placing her in stereotyped categories associated with women. Local offices are prohibited from processing job orders that contain unlawful sex specifications. ESM Part II §§ 8710-8739. (FD Exhibit 32.)

6. The system outlined in the ESM contemplates an objective, nondiscriminatory evaluation of an applicant's skills, abilities and preferences and a job related analysis of the employer's needs. Nonetheless the system depends on the skills, judgment and attitudes of each local office interviewer. The system allows an interviewer flexibility in matching applicants with job opportunities based upon job related factors. Neither federal nor central state authorities can exercise complete control over the one-on-one relationship at an

employment service interviewer and an applicant or an employer.

D. Statistical Expert Evidence

The State Defendants introduced an expert witness to present their statistical analysis of rate of referrals for job applicants and the average rate of salaries of those job referrals.

The Federal defendants introduced expert evidence to support the validity of tests prepared by MSES for use by the Cleveland office in making job referrals of job applicants.

VI. The Battle of the Analysts and/or Experts.

A. Plaintiffs' Analytical and Expert Evidence.

Plaintiffs' analyst prepared from the statistical evidence obtained for use at trial certain exhibits and charts.

Relying upon the premise that all available and material factual and statistical information had been obtained and

presented to plaintiffs' analyst for her consideration in preparation of exhibits and charts and the accuracy of her analysis thereof, plaintiffs' experts concluded that those in charge of the Cleveland office and responsible for the referral of job applicants on job orders were guilty of discriminating against plaintiffs and members of the class on the basis of race and sex.

Dr. James L. Outtz, an expert in Testing and Industrial Psychology, testified for plaintiffs. He based his conclusions primarily on plaintiffs' Exhibits 145, 163 and 127 and Stipulation paragraph 78.

At trial, the Federal Defendants presented a motion to dismiss the action as to the Federal Defendants. The motion was premised on the proposition that the evidence presented by plaintiffs upon which Dr. Outtz based his opinion was not sufficient to support his conclusions.

Plaintiffs' Exhibit 163 is a chart prepared by MSES showing test results on specific aptitude test batteries administered by the Cleveland office in 1971. From this data, plaintiffs developed their Exhibit 145 which arrays the same information and adds to it a calculation of the percentage of persons with scores below norm, a percentage which they characterize as the percent of people who failed the examination or test. Dr. Outtz analyzed the percentages found in the percent failed column in Exhibit 145 to reach the conclusion that there was statistical adverse impact. Dr. Outtz did not independently know which persons fell in the column headed "Number With Scores below Norm."

The record reflects that the chart included in plaintiffs' exhibit 163, was prepared by David Morris. Mr. Morris included in the figure given in the "below

norm" column those persons taking the test who scored either "M" or "L". The figures used by Dr. Outtz from plaintiffs' exhibit 163 in the "below norm" column does not identify those who failed the test. For an explanation of letter grades H, M and L, see infra.

The Federal defendants concluded that since it was possible that all or most of the people with scores below the norm received the letter grade M and could have been in the pool of people referred, calculations based upon the chart in Plaintiffs' Exhibit 163 cannot show adverse impact.

Plaintiffs' Exhibit 127 purports to show a different rate of referral for blacks or whites of persons coded in the nurse aide code who were referred to a nurses aide training program. The evidence reflected that Dr. Outtz did not know how many if any of those persons were test selected.

In the absence of such information, the Federal Defendants argue that this exhibit cannot demonstrate adverse impact in fact in terms of test selection.

Stipulation paragraph 78, contains a chart of racial differences on scoring on various aptitudes of the general aptitude test battery (GATB). Federal Defendants contend that since no evidence was presented to demonstrate any impact of any tests in the Cleveland office, the information contained in Stipulation Paragraph 78 does not prove anything.

The motion to dismiss made during the trial, was briefed by the parties on one-day notice. After having given due consideration to the matter, although impressed with the validity of the position asserted by the Federal defendants, the court elected to overrule the motion in favor of finishing the trial and deciding the action on the merits.

The Federal Defendants have filed a post-trial motion to dismiss or for summary judgment for failure to make a prima facie case of adverse impact. The motion presents the same issues included in the Federal Defendants' motion to dismiss filed during the trial. The parties have submitted additional memoranda supporting their respective views.

The action has been tried in its entirety. The court concludes that the interest of all parties will be served by treating the post-trial motion as moot.

The court received other expert evidence in support of plaintiffs' position that the evidence as a whole sustained plaintiffs' charge of discrimination on the basis of race and sex by the Cleveland office.

Plaintiffs' expert evidence also attacked the validity of the tests promulgated by the Federal Defendants for use by

MSES at its Cleveland office on three specific occupations--(1) table worker positions (S-28); (2) licensed practical nurses training programs (S-270); and (3) nurses aide training and jobs (S-282) and asserted adverse impact from use of the test on black applicants.

The discrimination in testing issue was the subject of extensive expert evidence introduced at the trial. Plaintiffs asserted invalidity of the tests and adverse impact of each upon the opportunities of members of the black race seeking employment through the facilities of the Cleveland office.

The Federal defendants defend the validity of the test through their own expert evidence and assert that proper validation procedures were taken on the test used in each of the occupations under attack.

B. The Testing Issue.

The court has tried the issues pertaining to the validation of the tests prepared by the Federal Defendants and used by MSES at its Cleveland office. From the evidence introduced, the court finds:

1. The United States Employment Service (USES) has developed the General Aptitude Test Battery (GATB) and the Specific Aptitude Test Battery (SATB) for use in the local employment service offices.

2. The GATB is composed of eight pencil and paper tests and four apparatus tests designed to measure the nine aptitudes found to be important for successful performance on various jobs. The nine aptitudes and tests are as follows:

G - Intelligence

Part 3--Three Dimensional Space
Part 4--Vocabulary
Part 6--Arithmetic Reason

V - Verbal Aptitude

Part 4--Vocabulary

N - Numerical Aptitude

Part 2--Computation
Part 6--Arthemetic [sic] Reasoning

S - Spatial Aptitude

Part 3--Three-Dimensional Space

P - Form Perception

Part 5--Tool Matching
Part 7--Form Matching

Q - Clerical Perception

Part 1--Name Comparison

K - Motor Coordination

Part 8--Marking [sic] Making

F - Finger Dexterity

Part 11-- Assemble
Part 12-- Disassemble

M - Manual Dexterity

Part 9--Place
Part 10--Turn

The GATB was developed on the

basis of a statistical analysis of 59 different kinds of tests which had been used in predicting performance in a wide variety of occupations. The nine GATB aptitudes were selected because they provide adequate measures of all the major abilities measured by the 59 tests. (Stipulation Exhibit 80, FD Exhibit 50, Testimony of John Hawk).

3. The GATB and Occupational Aptitude Patterns (OAP) are counselling devices and their use is governed respectively by § 9300 and § 4000 of Part II of the Employment Service Manual. These tools are not to override the individual's employment desires or job choices. The GATB or OAP are not at issue. (Stipulation exhibits 80 and 54, FD Exhibit 50).

4. The GATB was developed by the United States Employment Service (USES)

and has been used since 1947 by State employment services. Since that time the GATB has been involved in a continuing program of research to validate the tests in many different occupations and to insure that the tests used meet professional standards and legal requirements. The USES has consistently used the best information available, at the time, to develop high quality tools to further the basic goals of the employment service. USES research is goal-oriented so research efforts have been almost entirely in the area of applied as opposed to pure research. Wherever possible the USES has applied techniques and procedures which have been developed by others and demonstrated to have utility. (Testimony of John Hawk.)

5. The SATB is a test battery consisting of 2 or more of the GATB

aptitudes and is used as a measure of potential for success in a specific occupation.

6. Only the S-28, Table Work, S-270R Liscensed [sic] Practical Nurse and S-282 Nurse Aid tests are at issue in this case.

7. Since 1967 the majority of USES research efforts have been the investigation of the impacts of its tests on minority groups. USES research staff was doubled in 1972 for this purpose. An enormous amount of information has been gathered on USES tests and, the general finding is that USDOl tests are fair for minority groups. This also has been the finding of other investigations that have studied USES tests. (Testimony of John Hawk and Dr. John Hunter).

8. The use of the USES tests is

governed by the Employment Service Manual, Part II §§ 9000-9999 and includes the following sections:

(Stipulation exhibit 54 unless otherwise noted.)

a. It is the policy of the USES to use objective tests and related techniques as needed in the operation of employment service counseling testing and placement programs. ESM Part II, § 9001.

b. USES tests are developed to aid in the selection and referral of inexperienced, untrained and entry workers and under certain conditions for future promotion or transfer to more skilled positions. Applicants for specific occupations may be tested if the job order calls for workers with no previous experience in the job, newly recruited workers who will be provided on

the job training or newly recruited workers are to be considered to promotions to other than entry level jobs.

c. Aptitudes tests should not be used when the individual is experienced and has demonstrated proficiency in the occupation under consideration, the employers job order calls for specific work experience and aptitude test norms have not been developed for a particular occupation. There is no arbitrary or a priori choosing of tests and test scores. ESM Part II § 9157.

d. The application form of plaintiff Rebecca Gillespie indicates that she was given the nurse aid SATB although she was experienced as a nurse aid. (Stipulation Exhibit 8).

e. The interpretation of test scores is not a mechanical process. Although aptitude tests are more

accurate in determining an applicant's qualifications than any subjective means, test results are only one factor in determining an applicant's fitness for specific job opportunities. Other factors to be considered are educational, special skills, knowledge and physical capacity. ESM Part II § 9319.

f. In interpreting test results the interviewer or counselor should assume that the individual tested has at least the amount of aptitude demonstrated in the test and possible [sic] more. An applicant should not be excluded from consideration for a job or training on the basis of test results alone. If the applicant meets the other hiring specifications or training requirements, he or she may be referred for consideration together with test selected applicants. ESM Part II § 9312.

g. The USES has provided State employment services complete instructions for the administration and scoring of the SATB and are contained in the Manual for the GATB and the ESM. ESM Part II § 8395. (Stipulation exhibit 80, and 54.)

9. The SATB is scored H, M, or L. There are no absolute pass or fail scores. The letter scores are interpreted as follows:

H - Meets or exceeds all of the norms for a particular SATB. An applicant receiving H is judged to be satisfactory for the job, if also qualified on the basis of factors other than aptitude and may be referred.

M - The obtained score plus one standard error of measure meets or exceeds all the norms for a particular SATB. M scores are close to

those workers judged to be satisfactory and may be referred.

L - The obtained score plus one standard error of measure are below the requirements for "M". The chances of an applicant being satisfactory on the job are low. The applicant should be considered for other jobs which utilize stronger aptitudes. An applicant may be referred although if warranted by (1) factors other than aptitudes i.e., interests, training, experience, or motivation (2) local labor conditions requiring more than available H & M applicants (3) the employer has agreed to accept less competitive applicants as a result of job development. ESM Part II § 9312. (Stipulation exhibit 54, Testimony of John Hawk.)

10. USES deliberately set its cutting scores to "pass" at least 2/3 of those tested. Thus, instead of rejecting the vast majority of applicants, USES procedures insure that these applicants are given further consideration.

11. The "cut off" score for USES tests is set at a 2/3 - 1/3 level because USES experience over the years has been that 1/3 of employed workers are unsatisfactory; hence the 2/3 - 1/3 division was used in both the test scores and in the research sample. On any given job there is a range of performance from outstanding to very poor. What is acceptable performance is influenced by a host of factors including the perceived probability of hiring someone better than the worker in question. (Testimony of John Hawk and Dr. John Hunter.)

12. All applicants classified as "failing" in plaintiffs exhibits 145 and

163 are, according to testimony and USDOL policy, eligible for referrals. A proportion of those "failing" actually scored "M" and received very nearly the same consideration as those "passing". (Stipulation exhibit 54, testimony of David Morris and John Hawk).

13. Racial bias on the part of raters has not been demonstrated to exist in either the specific USES research at issue or as a general case. The validities of the tests for blacks and whites are of similar (positive) magnitude and at a useful level. Plaintiffs have alleged that the validities of the test for the total research sample may be caused by racial bias on the part of the raters assessing job performance and different levels of performance of the test by racial group. This has not been demonstrated.

14. In its research the USES uses a variety of different criterion measures

including supervisory ratings. The raters used for USES research were supervisors and had already spent a great deal of time in evaluating the performance of workers which is a significant job duty for supervisors. They are usually trained in performance evaluation by the employer. Raters are provided individual orientation, training and assistance when the ratings are obtained. Any question of rater bias is reported and data obtained from such a rater is not used. Plaintiffs have alleged that rater bias could have been reduced by training the raters. The record shows this is not the case. (Testimony of Herbert Campbell, John Hawk and Dr. John Hunter.)

15. Research has shown that ratings on specific behavior are not superior to the type of ratings used by USES. Plaintiffs allegation that specific rating scales would reduce rater bias is without foundation.

(Testimony of Dr. John Hunter.)

16. Empirical research has demonstrated that validity is not perceptably changed by differences in location, differences in specific job duties or applicant populations. Valid tests do not become invalid when these circumstances change. Plaintiffs' allegation that validity is specific to a particular location, a particular set of tasks and to a specific applicant population, or in other words, that a valid test in one set of circumstances is not valid in circumstances not perfectly identical is not true. (Testimony of Dr. John Hunter.)[1]

17. No evidence was presented that USES ratings were based on irrelevant job

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1. The research done by Dr. John Hunter and his colleagues shows that the validity of tests is broadly generalizeable across jobs, geographical locations and applicant populations. In both the 1970 EEOC Guidelines and the Standards of the American Psychological Association such research has been called for.

duties or were not related to measuring job performance. The ratings used by USES were based on quality, quantity and accuracy of work, job knowledge and versitility [sic], which are central and essential aspects of job performance. Plaintiffs allegation that the validities found in research were spurious because the ratings may have been based on irrelevant job duties or were not "meaningful" is not true. (Stipulation exhibits 68, 69, 73, and Testimony of John Hawk.)

18. It is well known within the industrial psychological profession that restriction in range of the research sample produces an underestimation of the relationship found in the incumbent population from which the sample is drawn. Thus plaintiffs' allegation that the validity coefficients obtained were spurious because of restriction in the range of abilities in the research sample is without merit. (Testimony of Dr. John Hunter.)

19. Test fairness is evaluated in a number of ways. The USES tests used are fair. Thus plaintiffs' allegation that the wrong model of test fairness was used is without merit. (Testimony of Dr. John Hunter.)

20. It was demonstrated using well established techniques and conservative estimates that the reported validity of USES tests are underestimates of the validity which actually exists when the tests are used with applicants. It was also demonstrated that a very considerable dollar value is associated with the reported levels of validity. There is no truth to plaintiffs' allegation that the levels of reported validities are so low as to be of no practical value. (FD exhibit 60, Testimony of Dr. John Hunter.)

21. No differences between the job duties in the research sample and the jobs in Bolivar County were specified.

According to research, even gross changes in job duties did not destroy validity. It follows that small and/or hypothesized differences have little or no effect on validity. Plaintiffs have not shown that the USES tests were invalid because the tasks of the jobs in the research setting may have been different from those in Bolivar County. (Testimony of Dr. John Hunter.)

22. USES' goal is to establish the best test battery possible, using the best available data, evaluated according to commonly accepted techniques. Batteries and cutting scores may vary from research sample to research sample because certain tests are "highly correlated", that is, measure similar aptitudes, and because cutting scores as well as the selection of individual tests for inclusion in a battery are developed to be the most fair to all subsamples. Thus, an individual test with a high validity

coefficient may not be used in a final battery if another test produces better results for a minority subsample. Revisions of aptitudes and cutting scores are made when research demonstrates that a different battery is valid on the research sample and can be cross-validated on previous samples. Plaintiffs' hypothesis that this demonstrates invalidity is simply without merit. (Testimony of John Hawk and Dr. John Hunter.)

23. The EEOC Guidelines on Employee Selection Procedures in effect at the time of the alleged discrimination are controlling.

24. The United States Employment Service (USES) tests meet all of the applicable EEOC guidelines for test usage and validation.

(a) Section 1607.1(b) has been met. Section 9012 of the Employment Security Manual (ESM) prohibits the use of test scores as the sole basis for making an employment decision. The USES never

uses tests without evidence of validity, ESM §§ 9103 B, 9157(A)(6).

(b) Section 1607.3(a) has been met. The USES tests have been validated and evidence a high degree of utility. (SATB technical reports for S-28, Table Worker, S-282 Nurse Aide, and S-27 Licensed Practical Nurse, testimony of John Hawk and Dr. John Hunter.)

(c) Section 1607.3(b) has been met. USES policy precludes the use of tests developed by others. ESM § 9001 B.

(d) Section 1607.4(a) has been met. The USES technical reports contain evidence of validity for the S-28, S-282 and S-270R tests. (Stipulation Exhibits 73, 69, 68.)

(e) Section 1607.4(c) has been met. The technical reports contain empirical data demonstrating that the test is correlated with important job elements.

State agencies are required to have on hand, as evidence of validation, copies of the technical reports for test batteries used in selection ESM Part II, § 9160 (Stipulation Exhibit 54.)

(f) Section 1607.4(c)(1) has been met. Differences in location, jobs and applicant characteristics do not alter the proper interpretation of validity evidence. Further, no credible evidence exists that differences between units, jobs and applicant populations alter test validity. (Testimony of Dr. John Hunter.)

(g) Section 1607.5(b)(1) has been met. No evidence was presented that any of the samples are atypical or unrepresentative. Differences in applicant characteristics do not moderate or change validity. (Testimony of Dr. John Hunter.)

(h) Section 1607.5(b)(2) has been met. USES tests are administered and scored under controlled and standardized conditions. (Manual for the GATB, Sections II Stipulation exhibit 80.)

(i) Section 1607.5(b)(3) has been met. The SATB technical reports fully describe the criteria used in evaluating worker behavior. In the case of rating techniques the appraisal forms and instructions to the raters are included. (Stipulation Exhibits 66-79.)

(j) Section 1607.5(b)(4) has been met. The supervisory rating scale used by USES has been carefully developed. The ratings are carefully evaluated for any evidence of bias. Any ratings where there is even a slight chance of bias are excluded from the study. (Testimony of John Hawk and of Herbert Campbell).

(k) Section 1607.5(b)(5) has been met. The USES has conducted differential validity research. The USES has assessed the validity of its tests and the tests are shown to have positive correlations between criteria and test scores that are statistically significant for minority subsamples. In addition to the statistical significance the USES tests have practical significance and a high degree of utility. (Testimony of Herbert Campbell and Dr. John Hunter.)

(l) Section 1607.6 has been met. The SATB technical reports include graphic and statistical representations of the relationship between the test and the criteria. The average scores for all tests and criteria is reported for all subgroups. Cut off scores were set much lower for these

tests than usual. The reason for this is to allow a greater number of test-takers to pass. (Testimony of John Hawk.)

(m) Section 1607.7 is not applicable since the Department of Labor uses only validation studies it has performed. ESM § 9159 (Stipulation exhibit 54).

(n) Section 1607.8 has been met. There is no assumption of validity of USES tests. The tests are validated in accordance with these guidelines and the American Psychological Association standards. ESM Part § 9160 A. (Stipulation exhibit 54.)

(o) Section 1607.9 has been met. All the SATB's used are supported by empirical research which provides substantial evidence of validity. All of the SATB's in this case have been or are in the process of being revalidated

with substantial minority subsamples. (Testimony of John Hawk, Stipulation exhibits 66-79.)

(p) Section 1607.10 has been met. USES aptitude tests are to be used for referral purposes only for occupations for which the tests have been validated. Only USES test [sic] are to be used by local employment service offices for referrals. ESM Part § 9160, 9150 (Stipulation exhibit 54.)

(q) Section 1607.11 is not applicable since there is no evidence of disparate treatment with respect to testing.

(r) Section 1607.12 has been met. Where conditions exist that may have affected test score applicants shall be retested as soon as practical with an alternate form of a proficiency or aptitude test. ESM Part II 9015 (Stipulation exhibit 54.)

VIII. Conclusion

This is not an ordinary racial and sexual discrimination in employment action. Plaintiffs charge defendants with the operation of the Cleveland office of MSES in such manner as to discriminate against them and the class members in employment opportunities on the basis of race and sex.

The court holds, based upon the evidence introduced at trial, that those in charge of the Cleveland office, including defendants Aldridge, Lindsey and the United States Department of Labor, have demonstrated to the satisfaction of the court a concern for plaintiffs and members of their class, and have used all reasonable diligence to afford them with equal opportunities in employment.

Plaintiffs' statistical evidence did not and could not take into account the human elements involved in affording a job applicant an opportunity of gainful employment. These

elements cannot be inserted into a computer in such manner as to play a part in affording a printout which reveals a true statistical analysis of the problem. The evidence also reflects that all of the relevant and available information was not reflected in the charts and schedules presented for use in the presentation of plaintiffs' case.

This court tried the Payne case (Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248 [N.D. Miss., 1976] aff'd in part, rev'd in part on other grounds, 565 F.2d 895 [5th Cir. 1978]), which pertained to employment practices at the Cleveland plant of Travenol Laboratories, Inc. One of the issues in Payne was the use by Travenol of a tenth grade or its GED equivalency educational requirement for all operative jobs in the plant. From February 1965 until the fall of 1971, the Cleveland office processed job orders from Travenol. These orders required that

the job applicant possess a tenth grade education or its GED equivilency [sic]. The Cleveland MSES office declined to refer an applicant to Travenol who did not meet the educational requirement.

In Travenol the court held that the said educational requirement was not shown to be job-related and a result of its application was to discriminate against black job applicants. Payne v. Travenol, supra, at pages 257, et seq.

The evidence before the court in the action sub judice shows that in 1970 or 1971, the Cleveland office discontinued the acceptance of job-orders from Travenol which contained the Tenth Grade of [sic] its GED Equivilency [sic] requirement.

The practice of the acceptance of job-orders from Travenol prior to 1971 containing the educational requirement aforesaid, served to discriminate against black

applicants. This practice was discontinued, however, before the filing of the complaint herein. The court finds that any misuse of the Travenol job-orders, prior to the institution of this action, does not support any relief herein for plaintiffs or members of their class.

When the evidence is considered as a whole, the court has concluded that plaintiffs have not shown by a preponderance of the evidence that they and the members of the class represented by them, have suffered, or are likely to suffer discrimination on the basis of race or sex at the hands of defendants or any of them.

On the issues involving the Federal Defendants, the court finds:

1. There is no evidence that the SATBs were used in any manner that adversely impacted on blacks or women. The plaintiffs failed to make a showing of adverse impact

of the SATB on minority groups.

2. Not all selection procedures are unlawful. The Supreme Court recognized this in Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) where it said "[N]othing in the Act precludes the use of testing or measuring procedures; obviously they are useful."

3. The procedures for validation and standards for use of USES tests conform to the Standards for Educational and Psychological Tests and Manuals issued by the American Psychological Association, and the Guidelines on Employee Selection Procedures published by the Equal Employment Opportunity Commission (EEOC) on August 1, 1970, in the Federal Register (Volume 35, No. 149), the test validation guidelines in effect at the time of the alleged discrimination.

4. Tests may be validated by properly conducted empirical research. In many cases tests have been held invalid when they have

not been empirically validated or when a validation study was an ad hoc, after the fact, attempt to validate a testing program already in use. See, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); U.S. v. Georgia Power, 474 F.2d 906 (CA 5, 1973). It was shown by testimony and documentary evidence that the USES has had since 1947 an extensive and ongoing research program of test develoment [sic] validation.

5. The SATB's used by the Cleveland local office were properly validated and did not unlawfully discriminate against minorities. Jackson v. Nassau County Civil Service Commission, 424 F.Supp. 1162 (E.D.N.Y., 1976); Friend v. Leidinger 588 F.2d 61 (4th Cir. 1978).

The court, having found that plaintiffs are not entitled to any relief against any defendant herein, directs the clerk to enter final judgment on the complaint, as amended, in favor of all defendants, and final

judgment on the third-party complaint in favor of the third-party defendants. The defendants and third-party defendants shall recover their costs as provided by law.

This 7th day of March, 1980

/s/ Orma R. Smith
UNITED STATES DISTRICT JUDGE

SERVICES RENDERED AND/OR ACTIONS TAKEN									
DATE		METHOD							
Opened	Referred	I.D.	Closed	Form No. & Location	ACTION TAKEN - EMPLOYER & JOB TITLE	Agency	REMARKS	Init.

DO NOT WRITE BELOW THIS LINE

1. Last Name | First | Middle Initial

2. No. and Street Address, Route or P. O. Box No. | 3. Telephone Number

4. City | State | 5. Zip Code

6. Give Directions to Your Home

7. Social Security Number | 8. Sex | 9. Date of Birth | 10. Grade | 11. Mar. Sep.

12. Other Last Name(s)

Name | Location | Year | Grade

13. Service Record Notes

Type of Discharge

Period of Service: From _____ To _____

15. Other Information
Marital Status: M Married, S Single, W Widowed, D Divorced
No. Dependents _____
No. Missing _____
Child Care _____

16. Vet. | 17. Vet. | 18. Vet. | 19. Other Notes
Name _____
Local No. _____

20. Transportation
Do you have a Auto? _____ Drivers License? _____ Regular ☐ Commercial ☐

21. Type of Work Preferred

22. Are there Types of Work You Will Accept

23. Occupational Title | Date

24. Location & Salary Minimum
☐ Local $ _____ ☐ Visit. $ _____
Other _____

25. Employer(s)

26. | 27. | 28. | 29. | 30. | 31. | 32.

33. | 34. | 35. | 36. | 37. | 38. | 39.

40. | 41. | 42. | 43. | 44.

45. Qualifications for Jobs(s)

46. Job(s) Accepted and Adjusted

USES 511 (8-68/70) APPLICATION CARD

APPENDIX A

JOB ORDER FORM

Trans No.	207 Code	Employer or Organizational Job Title
0585501		02 2

Employer Name	Whom to see
01 2	

Employer Street address	Telephone No.	Ordered By	Order Time

City	State	Zip Code	County		Federal use	
				4		4

CC	TC	Order Date	Loc. Off. No.	Sic/Occ	Cert/Civ	SIC Code	O.S.	Salary Per?	Open	Source	Agcy	Duration
03	2	Mo. Day Yr.								1. ___ J.O. 2. ___ Manpy. 3. ___ J.O. & Manpy.		1. ___ 1-3 days 2. ___ 4-150 days 3. ___ Over 150 days

Pay	Pay Unit	Hrs. Worked per Week	Exp. Yrs.	Equiv. Yrs.	Voc. Adj. Yrs.	Veteran Pref.	Previous Position	Area Code	State	
Dollars Cents	1. ___ Hour 4. ___ Month 2. ___ Day 5. ___ Year 3. ___ Week 6. ___ Other					1. ___ Emp. 2. ___ E. S. 3. ___ Other				4

JOB SUMMARY: ENTER HOURS/SHIFT/DAYS/HOW TO REACH/REMARKS AND SPECIAL INFORMATION

CC	TC	Card 4	
04	2		4

CC	TC	Card 5	
05	2		4

CC	TC	Card 6	
06	2		4

CC	TC	Card 7	
07	2		4

CC	TC	Card 8	
08	2		4

CC	TC	Card 9	
09	2		4

ASES 514 (R 7/75)

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROSIE LEE PEGUES, et al.,

Plaintiffs,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, et al.,

Defendants.

(March 7, 1980)

ORMA R. SMITH, District Judge:

FINAL JUDGMENT

This action came on for trial before the Court, Honorable Orma R. Smith, District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered, it is

Ordered and Adjudged

That the named plaintiffs and the members of the class represented by them herein, take nothing of the defendants, Mississippi State Employment Service, John E. Aldridge, Ernest C. Lindsey and the United States

Secretary of Labor, that the action be dismissed on the merits, and that the said defendants shall recover of the named plaintiffs their costs of action.

It is further ordered and adjudged that the third-party plaintiffs, Mississippi State Employment Service, John E. Aldridge and Ernest C. Lindsey, take nothing by the third-party complaint from the third-party defendant, The United States Department of Labor, and that each side shall bear its own costs.

Dated at Clarksdale, Mississippi, this the 7th day of March, 1980.

NORMAN L. GILLESPIE, Clerk

By: /s/ Margaret E. King
Margaret E. King, Deputy Clerk

Office-Supreme Court, U.S.
FILED
OCT 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-139

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROSIE LEE PEGUES, ET AL., PETITIONERS

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners ask this Court to review the ruling of the court of appeals holding that they failed to establish, except for certain job referrals for a limited period, that they were the victims of unlawful class discrimination on the basis of sex or race by the Mississippi State Employment Service (MSES).

1. Petitioners, four residents of Bolivar County, Mississippi, brought an individual and class action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, against the MSES and the federal defendants—the Secretary of Labor and the United States Employment Service (USES). In their class claims, petitioners alleged that the Bolivar County office of MSES had discriminated against women and blacks in classifying them for employment referrals and in making referrals. The state defendants claimed indemnity from the federal defendants

for any monetary liability for which they might be held liable: MSES contended that the USES was responsible for MSES classification procedures because USES supplied employment aptitude test batteries to MSES and prescribed the policies and procedures under which those tests were to be used in classifying applicants in order to determine employment referrals. After a lengthy trial, the district court entered judgment dismissing all individual and class claims. The court of appeals held that one petitioner, Rebecca Gillespie, had proven her individual claim (Pet. App. 63a-65a), and that petitioners had succeeded in establishing a pattern and practice of race and sex-based discrimination for certain referrals occurring during 1969 and 1970 (Pet. App. 31a-37a). In all other respects, the court of appeals affirmed the district court's decision (Pet. App. 65a).

Because the court of appeals upheld the dismissal of all claims against the federal defendants (Pet. App.49a-59a) and petitioners do not challenge that ruling, no issue directly involving the federal defendants is before this Court. We nevertheless briefly respond to petitioners' contention that this Court should review the court of appeals' ruling that they failed to establish any broad class-wide discrimination in employment classification and referrals by MSES.

2. In our view, the issues raised by petitioners do not warrant review by this Court. Petitioners argue that the court of appeals applied an unreasonably high standard in determining whether MSES violated Title VII simply because MSES was sued as an employment agency, rather than as an employer (Question Presented No. 1; Pet. 24-26). But the court of appeals did not purport to make such a distinction. Rather, its opinion expressly utilizes the legal principles applied to an employer's actions by this Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). See Pet. App. 11a, 20a.

The court of appeals correctly recognized that intentional discrimination may be established through the use of appropriate statistical evidence. *Teamsters, supra; Hazelwood, supra.*[1] The court nevertheless concluded, after a thorough analysis of all of the evidence presented, that petitioners had not proved intentional discrimination, except for certain actions occurring in 1969-1970. Petitioners ask this Court to review the court's evaluation of their statistical presentation.

As Judge Friendly stated in *Ste. Marie* v. *Eastern R.R. Association,* 650 F.2d 395, 397 (2d Cir. 1981), although "[d]ecision turns on the particular history and practices of each employer, and opinions thus have limited precedential value, [t]he guidelines for the determination of disparate treatment cases like this have been * * * clearly laid down by the Supreme Court in a series of cases [citations omitted] * * *." Accordingly, so long as the lower courts follow these guidelines in considering the specific evidence before them, there will ordinarily be no need for this Court to review the lower courts' evaluation of that evidence. There was no departure from the established guidelines here.

This Court, too, has emphasized that the "usefulness [of statistics] depends on all of the surrounding facts and circumstances," *Teamsters*, 431 U.S. at 340. In the instant case, the court of appeals heeded that admonition and

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[1]Although petitioners cast their evidence regarding MSES's classification and referral actions in the disparate impact model, the court of appeals ruled (Pet. App. 18a) that, "[b]ecause the classification and referral practices complained of effectively turn on discretionary decisions, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied." Accordingly, the court "analyze[d] [petitioners'] challenge to the classification and referral systems under the disparate treatment modality" (Pet. App. 19a). This is significant because in a disparate treatment case, plaintiffs must prove discriminatory animus. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. at 335, n.15.

carefully evaluated the evidence with regard to each of petitioners' claims. The court acknowledged (Pet. App. 23a) that petitioners "presented quantitative evidence of the disproportional classification of blacks and women in stereotypic, less renumerative occupations during selected years between 1970 and 1976. [However,] [n]o testimony, lay or expert, was offered to explain the significance of this data, nor was an appropriate test of statistical significance applied." In the absence of such vital evidence, the court was justified in determining that petitioners "[did] not show that race or sex, rather than work preferences, experience, education, and the state of the job market caused the imbalance" (Pet. App. 25a). The court properly noted that statistical evidence does not have to be "precise" (Pet. App. 29a; see *Hazelwood, supra*), but also correctly held that "no valid conclusions regarding the relationship of observed selection patterns to [MSES's] behavior can be drawn absent some minimal framework for analysis" (Pet. App. 29a-30a). The court found that, for the most part, such a framework was lacking here.[2] For example, petitioners' "rudimentary analyses did not purport to gauge the impact [of MSES's referral practices], in numerical terms, upon black and female applicants in Bolivar County by comparison with the appropriate cross-section of the relevant labor market" (Pet. App. 38a).[3] The court also discounted part of petitioners' statistical evidence regarding referrals because

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[2]It did find that petitioners had adequately shown a pattern of sexually segregated referrals to Travenol Laboratories between December 1969 and May 1970 (Pet. App. 34a-36a, 45a-49a).

[3]Although petitioners complain about the requirement that they make a comparison with the relevant labor market (Pet. 25-26), this Court held that such a comparison may be required in appropriate cases. *Hazelwood*, 433 U.S. at 308.

it "fail[ed] to incorporate the primary factor influencing referral—experience" (Pet. App. 39a-40a).[4]

In sum, although petitioners assert that the court relied on "unsupported speculation" that the disparities shown by petitioners' statistics were due to factors other than discrimination (Pet. 33), a reading of the court of appeals' opinion shows that it instead simply refused to disregard the multitude of factors other than race or sex that could cause statistical imbalances. Because petitioners' evidence largely ignored those factors, the court quite reasonably determined that it did not provide an adequate basis for inferring discrimination. That evaluation is one controlled by the facts of this particular case; it does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1983

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[4]Similarly, the court discounted the analysis offered by petitioners' expert because it did "not take into account the relative qualifications of persons referred during the relevant period " (Pet. App. 41a).